THE TERMINATION OF THE QUICKENING DOCTRINE: AMERICAN LAW, SOCIETY, AND THE ADVENT OF PROFESSIONAL MEDICINE IN THE NINETEENTH CENTURY

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The moment life began was defined at the beginning of the nineteenth century by the mother's awareness of fetal movement. That moment was called quickening. The common law of England and of the early United States embraced quickening. Prior to quickening abortion was legally and socially benign. Abortion was a non-issue, for life was not considered to exist before the fetus was quick -- which usually occurs in the fourth or fifth month of gestation. At the early stages of fetal development there was no difference between terminating pregnancy and simply restoring menses.

By the end of the nineteenth century, the quickening doctrine was no longer the key to abortion law. The doctrine was dismantled for a variety of reasons. The American Medical Association (AMA) played a major role in the movement to redefine the moment of animation and restrict abortions. The physicians' motivation was not concern for the fetus. The physicians gained status and power from the restriction of abortion; they emerged from

the century as the only abortion authority. Physicians alone were able to sanction abortions.

Changes occurred in the nineteenth century that increased the sense of urgency of the physicians' campaign. They utilized sensitive issues to persuade state legislatures to act. The main issues included a shift in the women seeking abortions and disparities in the population trend. In the 1840s there was an upsurge of married women in the upper classes having abortions. Abortion was no longer for the shamed single women. That trend combined with the increasing number of births among the lower class and foreign born to concern native America that they were going to be outbred. The physicians capitalized on eugenics and collective fear among the most powerful section of the population -- the law makers. Religious disparities in the population growth also concerned the primarily Protestant physicians. The fear and distaste is clear in their rhetoric.

Physicians were empowered by the sole ability to grant abortions, emerged as primary care givers, and successfully lobbied state legislatures for the alterations in law that allowed them to fill those roles. The common law quickening doctrine was transformed until a near prohibition on abortion existed by the 1880s. The termination of legal abortions fueled by the AMA lasted for nearly a century.

Introduction

In the early 1800s written guides and folklore supplied women with methods to terminate pregnancy. In 1810, an article written by Joseph Brevitt provided multiple means for a woman to restore menses. The process was called the "restoration of menses" as opposed to abortion. The concept of abortion was nonexistent for Americans in the early nineteenth century. Pregnancy was not considered to exist until the fetus was able to move and the mother was aware of such activity. From that moment the woman was quick with child. Before the instance of quickening the woman's condition was indistinguishable from the absence of menstruation. Terminating gestation was not at all criminal prior to quickening. Law and society did not recognize fetal life before that moment of animation.[1]

By the late nineteenth century, women were being prosecuted for seeking abortions along with the people providing the procedure. Pregnancy existed from the moment of conception according to legal authorities. Interrupting gestation gradually became illegal, and courts sentenced

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[1]Joseph Brevitt, Female Medical Repository (Baltimore, 1810), 46-47.

women and abortionists. The climate concerning abortion in the United States was clearly transformed during the nineteenth century.

In an eighty-year period the transformation of abortion law was complete. It shifted from nonrestrictive to almost completely prohibitive in character. There was no law addressing abortion at the country's inception. Legislatures began altering the toleration of abortion in the 1820s; by the 1880s, physicians were essentially the only people able to sanction a legal abortion. The forces driving the metamorphosis included racism, class bias, eugenics, nativism, and the ambition of the American Medical Association.

As in other areas of law, North American colonists adopted the English common law concerning abortion. The common law maintained that animation was the crucial moment of gestation. Common belief held that animation occurred when the mother noticed fetal movement. The awareness of movement signified that the mother was "quick" with child -- officially carrying a child with a soul. Based on that theory of animation, the quickening doctrine guided common law. According to the doctrine, abortion prior to quickening was equated with simply restoring a woman's menses. Before that magic moment, people considered pregnancy something blocking the woman's menstrual cycle. Restoring menses under such circumstances was not criminal,

nor did a negative social stigma accompany the action. Even after quickening, abortions were simply misdemeanors.[2]

The newly formed United States firmly accepted the quickening doctrine. The 1812 Massachusetts Supreme Court reaffirmed its validity in the case of Commonwealth v. Bangs.[3] The court ruled that without evidence of quickening, the abortionist was not guilty -- even of a simple misdemeanor. A crucial aspect of the common law fortified by Bangs was that the woman was immune from any legal complications. The person performing the abortion or administering the abortifacient was the only party potentially accountable at law. The early law of the United States was committed to a woman's immunity in abortion cases -- her guilt was not an issue in instances of self-induced abortion or for seeking abortive services. The legal system also strongly supported the legality of abortions prior to quickening.

The adherence to quickening changed as the United States matured. Connecticut passed the first piece of legislation that addressed abortion in 1821. Other states followed Connecticut's lead. The initial phase of legislation mentioning abortion addressed the issue as part of a broad criminal code. The laws resembled anti-poisoning

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[2]Lionel H. Frankel, Law, Power, and Personal Freedom (St. Paul, Minnesota: West Publishing Company, 1975), 379.

[3]Commonwealth v. Bangs (Massachusetts, 1812).

laws, maintained the woman's immunity, and acted as protective legislation. The first series of laws did not counter the legality of abortions before quickening; it simply sought to protect women from potentially negligent abortionists. The quickening doctrine and perceptions of abortion were altered as a variety of societal forces developed.

In the early-to-mid-nineteenth century there were several phenomena that occurred almost simultaneously. The emerging factors were mutually reinforcing. One major factor was the significant increase in the visibility of abortion services. Abortionists and abortifacients were initially confined to the private realm. Self abortions at home using home-grown concoctions were typical. Commercialization led to a thriving new market in which some abortionists prospered significantly. With commercialization, new patent medicines appeared based on traditional herbal remedies. Commercialization also meant the advent of the mail order abortifacient business. Eventually even devices intended to procure abortion were sold via the newspaper. In addition to frequent newspaper advertisements, urban areas were inundated with circulars. Commercialization furthered the transformation of abortion from a private home issue into a public practice.

Determining the number of women who terminated their pregnancies is difficult given the absences of detailed

records and the ease with which abortion could be privately procured. Prior to the surge of commercialization, evidence of abortion is apparent in the number of home medical guides that discussed methods of inducing abortion, the frequency of remedies passed in cookbooks, and the testimony of medical figures. During the commercial phase, the great fortunes amassed by abortionists serve as evidence of the practice. Testimony concerning the increase in number of abortions was quite common among physicians of the period. The doctors supporting the founding of the AMA compiled reports that estimated abortions in some areas averaged one in every four live births. Trends in population growth also indicate that family limitation was fairly common particularly among native segments of society.[4] The rise in estimated abortions coupled with the increased visibility of abortion services and concerns about disparities in population growth heightened American sensitivity to abortion. These factors also provided physicians with ammunition to elevate their status. They rallied around abortion and highlighted the changing trends in American society.

The fact that married, upper-class women were seeking abortion services increased sensitivity to the abortion issue -- particularly given the disparity in procreation

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[4]Robert V. Wells, Uncle Sam's Family: Issues and Perspectives on American Demographic History (Albany: State University of New York Press, 1985), 38.

rates between foreign newcomers and native white Anglo Saxon Protestant, (WASP), America. Physicians used those sensitivities to further their campaign. They also reevaluated the traditional acceptance that life began at the moment of quickening. They denounced the doctrine and adopted moral rhetoric. This denunciation propelled the physicians into the prominent status of being not only medically knowledgeable, but also morally superior to those medical "quacks" still willing to act as abortionists. Physicians participating in the AMA referred to themselves as "regulars"; medical authorities not involved in parallel medical and educational pursuits were called "irregulars." Rhetoric almost exclusively identified irregulars in female terms and was filled with contempt.

The alteration in the attitudes of physicians combined with their ambition to involve legislatures in rectifying the abortion situation made an impact on abortion laws. Physicians successfully worked to alter public opinion. Not only did they write state legislatures and submit abortion reports that they compiled, but they also bombarded the press. The press began to sensationalize abortion deaths, even though they were financially supported in part by the abortifacient advertisements in their papers. Such coverage alone did not propel state legislatures to revise abortion codes, but it helped to create an environment that was not publicly opposed to such measures. The physicians' ambition

seems to have had the greatest influence on the evolution of abortion legislation protecting women from dangerous abortifacients to prohibiting the practice unless sanctioned by a physician.

The "regulars" were motivated based on a need to rally around a topic that would elevate their status. Abortion became an issue that raised people's concerns. Originally it was not considered a deviant act, opposed to God's law, or contemptible. Once the physicians' campaign stripped quickening of significance, abortion was redefined as a moral issue. The physicians spearheaded the move away from quickening and embraced the prohibition of abortion at law. Social factors aided the physicians. Social trends such as the decline in population, the disparity in native and foreign birthrates, and the increase in abortions among married women were repeatedly highlighted by physicians addressing abortion. Ethnic, racial and class solidarity united some people, most importantly men sitting as governmental representatives, in favor of the physicians' campaign and concerns. The idea that women were rejecting motherhood to pursue fashion and leisure was also promoted in their writings. Abortion facilitated the move away from traditional roles. The deviation reinforced the problem in class and racial procreative disparities. The physicians were activists against abortion. They operated their campaign with insight regarding the concerns most likely to

incite people against abortion. They wielded the most explosive possible weapon against legal abortion. Once illegal, physicians would not have to struggle with the Hippocratic Oath, knowledge of animation, or competition from those willing to provide their patients with any service desired, including pregnancy termination.

The campaign to halt the practice of abortion through legislative means was partially successful. Legislation was framed in a manner that restricted abortions, unless sanctioned by physicians. Though legislatures installed anti-abortion laws in the United States, the nineteenth-century transformation did not render the practice extinct. Physicians successfully emerged as the dominant medical care givers. The medical profession was also able to call the clergy and legislators to assist in the alteration of common law notions concerning animation and abortion. It was transformed into a public issue, and those three groups of moral authority figures were vocalizing the negative aspects of terminating pregnancies. Governing authorities were willing to temporarily accept a legal prohibition of abortions. Abortion remained an alternative for pregnant women, though the practice was again decommercialized. Instead it became a private, underground phenomenon during the majority of the twentieth century.

Social and Legal Acceptance of Abortion

The Common law passed on from England to the colonies did not discourage abortion in any way. Restoring one's menses was not equated with abortion. Terminating a pre-quickened pregnancy was legally and socially acceptable; the act was considered to be so benign that it was not a public issue. Abortion existed exclusively in the private realm unitl the mid 1800s. Methods of abortion, however, did circulate among women.

Conversation and experience provided women the means to increase their understanding of their bodies. Midwives were a main factor in the spread of information useful to women. Women in the nineteenth century shared their wisdom fairly openly with each other. Historian Carroll Smith-Rosenberg declared after an examination of the Schlesinger Library's cook book collection that "women collected and exchanged recipes for medicines as routinely as they did for pies and cookies."[5] Women were urged to understand the importance of menstruation -- it was the area of their physical life taken

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[5]Carroll Smith-Rosenberg, Disorderly Conduct: Visions of Gender in Victorian America (New York: Alfred A. Knopf, 1985), 228.

taken most seriously. Women and their medical advisors believed that the absence of menstrual flow (amenorrhea), an excessively heavy flow (dysmenorrhea), and menstrual cramps (menorrhagia) could lead to serious illness and even death.

Because of the importance assigned menstruation, women had access to methods that could restore normality to their menstrual cycle. A large portion of such information was dedicated to the restoration of menses. Given the absence of pregnancy tests, amenorrhea and pregnancy were indistinguishable until the mother was aware of fetal movement. Women used abortifacients to restore menses in either situation. The identical treatment of the indistinguishable conditions meant that enforcing laws concerning abortion would be extremely difficult. The intention of administering abortifacients was impossible to prove. Once quickening occurred, the mother was still the only party to know unless she shared that information.

Abortions were accessible to women in North America prior to the commercialization of the abortion industry. There were three main types of abortion -- physical, chemical, and operative. All had potential for both success and danger. When pondering the danger of abortion, it must be considered relative to the perils inherent in childbirth prior to advanced medical knowledge. Particularly early in gestation, the risk of induced miscarriage seemed less

dangerous and frightening than actual childbirth and other complications associated with pregnancy.[6]

The operative method became more frequent with urbanization and commercialization. For Native Americans and early Americans, the first two categories were more readily accessible and required less assistance. Operative methods were usually performed at "lying in houses" and the recovery period was monitored. Lying in houses were boarding houses where women underwent the abortive procedure and spent the recovery period. Physical and chemical methods were much more private, and less obvious to the community at large. Physical methods of inducing a miscarriage include hot baths, heavy and prolonged exercise, adjustments and manipulations altering the circulatory flow to promote uterine contractions, and violent procedures targeting the lower abdominal region. The physical methods could produce abortion, though it was difficult to balance the activity to cause disruption of the pregnancy while

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[6]Janet Farrell Brodie, Contraception and Abortion in Nineteenth Century America (Ithaca: Cornell University Press, 1994), 41-42; Brodie's work is an excellent piece on the trends in the nineteenth century; she emphasizes the contraception movement, though her research on the anti-abortion movement is quite revealing. James C. Mohr's Abortion in America is also a well written source about abortion policy in the nineteenth century. Mohr's examination is soley of abortion; contraception is not adressed to any significant extent. Mohr's examination of abortion policy extends beyong the decline of the quickening doctrine and the ramifications of that alteration. Mohr considers the evolution of the polarized nature of the abortion debate.

maintaining the health of the woman.[7] Chemical methods could also prove damaging, even fatal to the woman, if caution was not used in determining dose and frequency of the various concoctions.

Chemical abortifacients fall into one of four categories -- purgatives, intestinal and pelvis irritants, uterine contraction stimulants, and systemic poisons. Purgatives included aloe, castor oil, and croton oil. Pennyroyal oils, savin, rue, and tansy could act as intestinal and pelvis irritants. Quinine, ergot, and pituitary extract were used to stimulate uterine contractions. The systemic poisons included lead salts, apoil, kerosene, mercury salts, oil of wintergreen, and nitrobenzene. Ideally, systemic poisons would act more quickly on the fetus than on the woman.[8]

Operative methods were designed to dislodge or remove the fetus by entering the uterus through the vaginal canal. Cutterage was a method of scraping the uterine walls, and it became increasingly more damaging to the woman as gestation progressed. Following the third month of pregnancy, dilation of the cervix was a possible abortive method, as was puncturing the amniotic sac. Early attempts at such procedures reportedly included the use of umbrella ribs,

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[7]Harold Rosen, Abortion in America: Medical, Psychiatric, Legal Anthropological, and Religious Considerations (Boston: Beacon Press, 1967), 6.

[8]Ibid.

darning needles, hat pins, wire, and wood. Given the nature of the utensils and the tendency towards infection, operative methods were the least safe.[9] When stories of abortions that led to a woman's gruesome death were publicized, they were frequently of the operative variety.

Herbs were the most readily available abortifacients. Exposure to the Native American community and the African-American slave community increased colonists' knowledge of herbal solutions.[10] Nicholas Culpeper revealed twelve botanicals associated with miscarriage in The English Physician and Complete Herbal. The twelve herbs mentioned were common to gardens in New England, and were identified as herbs to "bring on a woman's courses." The preparations included calamint, sage, honey suckle, pennyroyal, common groundpine, brake fern, bistort or snakeweed, and gladwin.[11] Pennyroyal was used by some Native American women and was colloquially referred to as "squammint." American medical plant authority Charles Millspaugh said pennyroyal "will often bring on the menses nicely; and, if combined with a gill of brewer's yeast, it frequently acts well as an

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[9]Ibid., 7-8.

[10]Though there are limited accounts of slave women's experience with abortion, there are descriptions of the use of cotton root by slaves to procure abortion. Various physicians and plantation owners comment on the abortion phenomena in Herbert George Gutman, The Black Family in Slavery and Freedom, 1750-1925 (New York: Pantheon Books, 1976), 80-82.

[11]Brodie, Contraception and Abortion, 42.

abortivant, should the intender not be too late with her prescription."[12]

Other sources indicated the abortive properties of the mint species including savory, spearmint, peppermint, rosemary, marjoram, European lavender, catnip, American horsemint, balm, horehound, and hyssop.[13] Fourteen of the most toxic plants in United States' folklore were labeled abortifacients. They included foxglove, white and black hellebore, may apple, boneset herb, the crowfoot family, mistletoe, bloodroot, and castor bean. Some Native American tribes used "black cohosh," a member of the crowfoot family, and perhaps the most effective of the herbal preparations. In the late 1600s in Middlesex, Massachusetts, there were four noted attempts of producing abortion with savin boiled in beer. Of those attempts one proved effective.[14]

Once a woman began to suspect menstrual obstruction, including pregnancy, she typically initiated a certain routine. She began by soaking her feet in hot, herbed water or drinking herbal teas. The second step was possibly to breathe herbal vapors followed by the application of "herbal mixtures or mustard plasters to her breasts." Participating in slightly taxing physical activity was also a part of the

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[12]Charles Millspaugh, Medical plants 2 vols. (Philadelphia: John C. Yorston, 1892), reprinted as American Medical Plants (New York: Dover, 1974), 463-464.

[13]People also attributed the mint species with the ability to prevent conception and remove a dead fetus.

[14]Brodie, Contraception and Abortion, 43.

standard routine. If menstruation did not follow, the routine was repeated, though the amounts of herbs and exercise were increased. The process could continue for a few months or until pregnancy was certain. At that point the procedure became more complicated. By the seventeenth century, it became increasingly common to restore menses using cervical instruments. After another hundred years women were using slippery elm bark to procure abortion.[15]

The accessibility of abortifacients and the frequency of their mention in herbal guides and home medical manuals indicate that, though a private act, abortion was imbedded in American life. Just as abortions were feasible based on the availability of abortifacients, there was not a single piece of legislation deterring or regulating abortion until 1821. Before the advent of pregnancy tests, the absence of menses and pregnancy were indistinguishable early in gestation. Both relied upon the same remedies. The shared symptoms of amenorrhea and pregnancy made enforcing abortion laws near impossible once such legislation existed. Proving the intent of the person administering an abortifacient was critical -- for anti-abortion legislation was penned to prevent the termination of pregnancy, not the restoration of menses.

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[15]Ibid., 42.

The Quickening in Early Legislation

In matters of law, the doctrine of quickening was the essential moment in the development of a fetus. The doctrine held that the fetus became viable upon quickening. Quickening was the moment of animation, the first moment that the mother could feel fetal movement. The doctrine was developed by theologian Thomas Aquinas. His philosophy of quickening determined that the mother's awareness of movement signified the moment that a soul entered the fetus.[16] English common law embraced Aquinas's theory. Common law was then transplanted into the North American colonies and influenced the U.S. legal system for two centuries.[17]

In his definitive Commentaries, on the common law, William Blackstone claimed that "Life begins in the contemplation of law as soon as the infant is able to stir in the mother's womb."[18] Under the common law abortion

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[16]John T. Noonan, Jr., "Aquinas on Abortion" in St. Thomas Aquinas on Politics and Ethics, ed. Paul E. Sigmund (New York: W.W. Norton and Company, Inc., 1988), 245.

[17]Though quickening was removed from most state statutes as a full prohibition of abortion was adopted, as late as 1956 there was still mention of quickening as a distinction in Mississippi.

prior to quickening was not a crime at all. After quickening the act of abortion was considered a misdemeanor. The term "criminal abortion" applied strictly to post-quickened terminations and the crime was minor. According to Blackstone,

> If a woman is quick with child, and, by a potion, or otherwise, killeth in her womb, or if any one beat her, where by the child dieth in her body, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious light, but merely as a heinous misdemeanor. But if the child be born alive, and afterwards die in consequence of the potion or beating, it will be murder.[19]

The most significant points of Blackstone's statement include the absence of any scorn toward pre-quickened abortions and the party responsible for the act. Because the woman does not come under fire for the abortion, the common law resembled and, once codified, became protective legislation. The law monitored the abortionist, not the mother. This point is essential to understand the evolution of abortion legislation. Later, as the burden shifted and the mother became the guilty party, the legal environment

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[18]Lader, Abortion (New York: Bobbs Merrill, 1966), 78.

[19]William Blackstone, Commentaries on the Laws of England (Philadelphia: J.B. Lippincott and Company, 1861), 129, and note; for a concise discussion of the common law in England see Amos Dean, Principles of Medical Jurisprudence: Designed for the Professions of Law and Medicine (Albany: Gould, Banks, and Company, 1854).

was prime for the prohibition of abortion rather than simply the regulation of abortionists.

Another significance of the quickening doctrine is the way it allocates the power to terminate gestation. If the critical moment at law is when the mother feels fetal movement, then the mother has a knowledge that no one else is capable of knowing. She alone could make that determination. Medicine held that the magic moment occurred in the fourth or fifth month of gestation. Until that moment the mother might easily mistake pregnancy with amenorrhea. Midwives, medical practitioners, partners, and the community at large could not know when the fetus was legally viable. There were no pregnancy tests, simply the word of the woman, and this proved a tremendous impediment to enforcing the evolving legislation. As regular physicians began to alter their philosophy about terminating pregnancies, a pregnant woman could opt to seek treatment for menstrual blockage without disclosing her suspicion of pregnancy and if enough time had passed, not revealing quickening. Though women lacked legal and social equality, in instances of pregnancy they possessed power, for only they had the knowledge concerning fetal movement.

As mothers became culpable and physicians reexamined the accepted significance of quickening, legislatures altered the doctrine beginning in the 1820s and extending into the 1880s. The medical profession rethought quickening

and regulars began to scoff at the notion that animation occurred when the mother felt movement -- as opposed to animation at the moment of conception. The changes in perception about the advent of fetal life and culpability were major factors in the evolution of abortion legislation leading to a general prohibition. When women were considered guilty for pursuing termination options, then abortion legislation was no longer intended to simply protect women from shady abortionists. Prohibition of the practice was not the intent of initial abortion legislation; it was only an option once women themselves were subject to criminal prosecution for terminating their pregnancy.

In 1812 the Massachusetts Supreme Court firmly upheld the common law tradition of quickening as the critical distinction in the case of Isaiah Bangs. In Commonwealth v. Bangs, Bangs was charged with administering an abortifacient to his wife. The abortifacient that he administered successfully terminated the pregnancy. Bangs was acquitted based on his wife's prequickened condition. Since the pregnancy had not quickened, it was impossible for Bangs to have known if his wife was indeed pregnant.[20] Without certainty of pregnancy it was not possible to determine the intent of the person administering an abortifacient. The same potion was able to procure abortion or cure amenorrhea.

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[20]Commonwealth v. Bangs 9 Mass. 369 (1812).

The case set an important precedent in U.S. abortion law. The Bangs decision entrenched the idea that pre-quickened abortions were legally acceptable. Strong in the first half of the 1800's, this interpretation faded at different points in several states after mid century.

Initial legislation addressing the question of abortion occurred between 1821 and 1841 as a response to concerns that some abortifacients were too dangerous for women to ingest. During this twenty-year period, one federal territory and ten states passed abortion legislation of some variety. The General Assembly of Connecticut passed its first abortion statute in 1821. The law stated that

> Every person who shall, willfully and maliciously, administer to, or cause to be administered to, or taken by, any person or persons, any deadly poison, or other noxious and destructive substance, with an intention him, her, or them, thereby to murder, or thereby to cause or procure the miscarriage of any woman, then being quick with child, and shall be thereof duly convicted, shall suffer imprisonment, in Newgate prison, during his natural life, or for such other term as the court having cognizance of the offence shall determine.[21]

The Connecticut statute more closely resembled a measure to curb dangerous poisonings and not an attempt to strike at the legality abortion or the quickening doctrine. The concern centered on poisons which, when consumed, posed as threat as serious to the mother as it did to the fetus.

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[21]The Public Statute Laws of the State of Connecticut, 1821 (Hartford, 1821), 152-153.

Historian James C. Mohr declared that the law "did not proscribe abortion per say; it declared illegal one particular method of attempting to induce an abortion...."[22] The law did not mention operative and mechanical methods of producing abortion.

Perhaps the most significant point in the legislation is that it maintained the quickening distinction. The administration of poisons was only illegal if the woman was quick with child. The person held culpable by the law was not the woman carrying the fetus, but the person responsible for administering the poison. By targeting the provider of the potion and not the woman seeking the abortion the law was an attempt to protect women from people willing to sell dangerous substances as abortifacients. Since the administer was the target and other methods of abortion remained untouched, the 1821 statute did indeed closely resemble anti-poisoning legislation. An objection to abortion was not the main motivation behind Connecticut's law -- instead it was a public health issue. It was an attempt to protect women quick with child from those willing to sell and administer potentially fatal poisons.[23] Missouri and Illinois passed similar legislation in 1825 and

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[22]Mohr, Abortion in America: The Origins and Evolution of a National Policy, 1800-1900 (New York: Oxford University Press, 1978), 22.

[23]Laws of Connecticut, 152-153; for an interesting discussion of the health issue see Fred M. Frottock, Abortion (Westport, Connecticut: Greenwood Press, 1983), 60.

1827 respectively. They both dealt with abortions induced by poisons and acted as protective legislation. The laws varied from Connecticut's in that the quickening distinction was not included. Though the law did not explicitly lay out the quickening doctrine, this was a function of assumption rather than a departure from the doctrine. The intention of the person administering the poison was crucial to determining if a crime had been committed. In order to prove that abortion was the intent of the person administering the potion, they had to know if the patient was pregnant. In order to know that the woman was pregnant, she obviously would already have felt fetal movement and thus be quick with child. The word "quickening" is not present in either state's first statute, but by outlining that the administer was only culpable if intending to procure abortion, quickening is an issue -- abortion could not be the intention if the woman was not quick with child since quickening was the only certain confirmation of pregnancy. Neither state was rejecting the distinction.[24]

The state of New York passed legislation in 1828 which, like Connecticut's law, seemed protective in nature and codified English common law. The New York statute did not

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[24]Laws of the State of Missouri; Revised and Digested by Authority of the General Assembly (St. Louis, 1825), 283; Illinois Revised Code of 1827, 130-131, as cited in Eugene Quay, "Justifiable Abortion," The Georgetown Law Review 49:3 (Spring, 1961): 466.

address abortions occurring before quickening, nor did it target the woman herself. The law did prohibit abortions induced by any method after quickening. The person performing an abortion after quickening was guilty of second degree manslaughter if the abortion was successful or if the woman died. If the abortion was unsuccessful and the mother survived the procedure, then the abortionist was not guilty of anything. The attempt itself was not a criminal act, and the woman was not culpable. In this sense the New York law has a protective nature and not a strict anti-abortion tone. New York's law served as a model for other states' legislation as it distinguished punishment based on quickening and provided an exception.[25]

The New York law read

> Every person who shall willfully administer to any pregnant woman, any medicine, drug, substance, or thing whatever, or shall use or employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, or shall have been advised by two physicians to be necessary for that purpose; shall, upon conviction, be punished by imprisonment in a county jail no more than one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.[26]

The clause sanctioning physicians to determine necessity introduced a new concept in American law. It allowed

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[25]Frankel, Law, Power, and Personal Freedom, 381.

[26]The Revised Statutes of New York... 1828-1835 Inclusive (Albany, 1836), I, 578, as cited in Mohr, Abortion in America, 27.

medical professionals to make a therapeutic exception. That power grew in significance as physicians lobbied for an unconditional ban on abortion and rethought the quickening distinction. The result of the therapeutic exception was a paradox in the physicians' theory. With the complete prohibition of abortion besides the therapeutic exception, the power to seek an abortion shifted drastically. The regular physicians had a great deal of influence on the introduction and passage of medical related legislation. In New York the regulars oversaw the appointment of members to the standing committee on medical practice through the speaker of the assembly.[27]

The second piece of legislation addressing abortion in Connecticut occurred in 1830, eight years after the first. The first law resembled an anti-poisoning statute as an attempt to address a public health issue, not to strike at the legality of abortion. The 1830 bill included a section that made abortion induced by instruments after quickening a crime. The punishment for such an act was seven to ten years in prison. Again the party liable was the person performing the act. Interestingly, the lawmakers determined the standard sentence for performing post-quickening abortion with an instrument was less severe. Those breaking the anti-poisoning statute faced a life sentence, though the

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[27]Mary K. Zimmerman, Passage Through Abortion: The Personal and Social Reality of Women's Experiences (New York: Praeger Publishers, 1977), 8; Mohr, Abortion in America, 37.

law deemed seven to ten years appropriate for mechanical abortionists. Abortions before quickening were still legal, regardless of the method attempted.[28]

The law was still a protective maneuver rather than a response to a strong objection against abortion. The intent of the law's framers was to protect women from the potentially untrustworthy abortionists in the field. Neither piece of legislation deviated from the common law quickening distinction, and both allowed the option of abortion prior to quickening. The lawmakers still held to the notion that animation occurred at quickening. It was the physicians, not the lawmakers, who initially challenged that notion.

Ohio passed another piece of abortion-related legislation that attempted to uphold public safety. The 1834 bill made abortion attempts that resulted in the woman's or fetus' death after quickening a felony. The law also stated that abortion was a misdemeanor without mentioning quickening. The section addressing abortion was included with clauses designed to reduce potential abuses by physicians. One such clause forbade the prescription of medicine while intoxicated. The Ohio law falls into the

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[28]The Public Statute Laws of the State of Connecticut, 1830 (Hartford, 1830), 255.

category of early abortion legislation designed to protect people from physicians.[29]

The quickening distinction remained either explicitly or implicitly based on the need to prove intent. In 1835 Missouri legislators toughened their 1825 law that dealt with poisonings. The statute inserted a section concerning the use of instruments to induce abortion after animation. Instrumental abortions became offenses equal to poisonings. Abortions prior to quickening were made a misdemeanor. This was almost completely unenforceable since to have an abortion one must first be pregnant. The only way to determine pregnancy was through quickening, and abortions were identical to treatments used for amenorrhea. An 1837 Arkansas law equated postquickening abortions with manslaughter but maintained the common law stance accepting pre-quickened abortions. In 1839 Mississippi made postquickening abortions second-degree manslaughter though pre-quickened abortions remained perfectly legal. The same year the territory of Iowa passed an anti-poisoning law that resembled the first piece of legislation in Connecticut. In 1841 Alabama made all abortions after quickening a criminal offense. The statute did not use language of the

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[29]Statutes of the State of Ohio (Columbus, 1841), 252.

quickening doctrine though it prohibited abortions of "pregnant women" which was synonymous with "quickened."[30]

In 1840 Maine enacted the strictest abortion law to date. At the same time the legislature introduced the bill, significant changes were occurring in the population. Physicians were also reevaluating their definition of abortion. The Eastman-Everett Act of 1840 declared the abortion of any pregnant woman was a crime. The law pertained to any pregnant woman -- pregnancy defined as carrying a quickened child or an unquick fetus. It diverged from the idea that pregnancies before quickening were not the same as those afterwards. The statute applied to all methods of inducing abortion. Like New York's law, it contained a therapeutic exception. The party facing punishment was the abortionist -- a $1,000 fine or a year in jail if the procedure failed. If the fetus was aborted, the jail time increased to five years.[31]

The Supreme Court of Maine tested the Eastman-Everett Act in 1853. The case illustrates the problems of

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[30]Revised Statutes of the State of Missouri (1835), 168; T.J. Fox Alden and J.A. Van Hoesen, A Digest of the Laws of Mississippi (New York, 1839), 867; Acts Passed at the Annual Session of the General Assembly of the State of Alabama, 1840-1841 (Tuscaloosa, 1841), 143; Mohr, Abortion in America, 38-43, provides a synopses of the law of the various states and territories; Wendell W. Waters, Compulsory Parenthood (McClelland and Stewart, 1976), 86.

[31]The Revised Statutes of the State of Maine, Passed October 22, 1840 (Augusta, 1841), 686.

enforcement that accompanied any abortion legislation prior to the sophistication of pregnancy tests and medical knowledge of women's cycles. Though the act sought to alter the common law distinction of quickening, there was another point that allowed the release of abortionist Mr. Smith. Justice John Tenney determined that though Smith caused the woman's death by inserting a metal wire into her uterus, Smith's intention was integral to the court's decision. He could have meant to treat some condition other than pregnancy, according to Justice Tenney. The intention of the abortionist was an essential ingredient in an abortion trial -- one that added to the difficulty of convicting abortion providers. Though the law was the most stringent to date in the United States, it was nearly impossible to enforce.[32] It was difficult to prove that an abortionist was treating an unquickened woman for pregnancy. Without proof of intention, there was very little chance that the court would be willing to convict an abortionist.

All of the aforementioned states' legislation concerning abortion was a portion of larger bills addressing crime. The abortion issue had not been a subject that received a great deal of attention as a single issue. Reaction to the laws was nonexistant in the media --

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[32]Asa Redington, Reports of Cases in Law and Equity Determined by the Supreme Judicial Court of Maine, vol.XXXIII (Hollowell, Maine, 1853), 48-61, cited in Mohr, Abortion in America, 42.

religious figures were equally silent.[33] The populace at large and the church leaders were not focused on abortion as an issue. Instead, the debate concerning abortion was unique to the legal and medical professions. The laws emerged as a reaction to the potential abuses among people who were trusted to provide medical attention. Regular physicians were interested in controlling medical practices. The Hippocratic Oath and the reduction of competition from physicians of the irregular variety fueled the regulars' desire. Both motives become apparent when examining their efforts in the nineteenth century. The legislators were interested as a matter of public health and, as apparent in New York, were directly influenced by regulars controlling post appointments.

All of the legislation detailed thus far targeted the abortionist. The woman was not culpable; the trusted medical figure was. Women's freedom from legal guilt stemmed from legislatures' desires to protect, not prosecute women. The laws sought to protect women and regulate the medical community for questionable practices. Since abortions were believed to become more dangerous as gestation advanced, the quickening distinction fits nicely into the public safety issues in abortion clauses. Not only did quickening work into the public health issue, quickening had not yet been dismantled in a campaign by regular

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[33]Mohr, Abortion in America, 42.

physicians that viewed pregnancy as an uninterrupted process resulting in human life.

By 1840, only ten of the nation's twenty-six states had addressed abortion through legislation. Half of those made abortion after quickening a crime. The other five did not explicitly mention quickening as a distinction, but some implied quickening through the term pregnant. All of the legislation was virtually unenforceable in terms of pre-quickened abortions. A combination of factors, however, altered the course of abortion legislation in the second half of the ninteenth century. The factors included a shift in those women seeking abortions, the commercialization of abortifacients, the increased awareness of women about abortion options provided by "irregulars," a nativist fear of being outbred, and the efforts of professionalizing physicians -- a category which has numerous layers. Those changes created an environment that accepted increased legal restrictions on abortion.

The Fear of Growing Population Disparities

The population of the United States declined significantly during the nineteenth century. Among white native-born married women, the birth rate declined forty-nine percent during the century. The average number of children dropped from 7.04 children to 3.56 children by 1900.[34] Horatio Robinson Storer determined that in 1846 there was an abortion for every ten pregnancies carried full-term. He then determined that only ten years later the number jumped to one abortion for every four births. He also stressed that, "innumerable ones occur that are never recorded."[35] By 1898 the Michigan board of Health reported that a third of pregnancies in the state ended in abortion. The Board estimated that married, wealthy women composed seventy to eighty percent of the abortion clientele.[36]

The birth rate declined with more proclivity in the 1840s than it did during any other decade in the nineteenth century. This change influenced the shifting attitudes

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[34]Brodie, Contraception and Abortion, 2.

[35]Horatio R. Storer, and Franklin Fiske Heard, Criminal Abortion: Its Nature, Evidence, and its Law, (Boston: Little, Brown, and Company, 1865), 34.

[36]Smith-Rosenberg, Disorderly Conduct, 221.

concerning the need for abortion legislation. The statistical evidence on decreasing births was used by the AMA and concerned physicians to bolster support for abortion prohibition. They were able to use population concerns to support their success and boost the esteem of doctors as moral crusaders with the power to determine issues of life and death. The most remarkable language used by regular physicians concerned birth rate disparity between social classes, differing ethnicities, and even among different religious groups. Class bias, fear of racial extinction, and eugenics are all apparent in speeches and testimonies offered by the regular physicians.

A recurring complaint of physicians was that women were more heavily influenced by fashion and leisure than by a desire to entrench themselves in motherhood. Carroll Smith-Rosenberg describes the underlying contradiction presented by such complaints. Bourgeois women were expected to present themselves in a manner that stood juxtaposed to the presentation expected of a woman immersed in the cult of True Womanhood. The Bourgeois woman was defined by society as educated, polished, active in social service, and sophisticated. They were to reinforce the class level of their husband and financial provider. They were also expected to limit their fertility. In contrast, women in the cult of True Womanhood were expected to be domestic, docile, and fertile -- roles confined to the private sphere.

The emergence of the bourgeois matron meant that women themselves, especially as wives, threatened the traditional role assigned to women.[37] Society expected two quite different functions of women.

The bourgeois woman was bearing fewer children. Couples were postponing marriage until their mid-to late-twenties, and there was a more conscious effort to space children at greater intervals. The educated, middle-and upper-class women were reducing their progeny. This reduction concerned physicians. The falling birth rate was problematic and scary to the pillars of bourgeois society. The fear stemmed from disparity in the falling number of children -- not all ethnicities and classes were experiencing similar reductions in the birth rate. Middle and upper-class white Anglo-Saxon Protestants were procreating less than others in the country. That disparity sparked an intense fear that the WASP in America was being outbred by the poor, the immigrants, and the non-Protestants.[38] The language makes it clear that this concern was major. Eugenics flood the rhetoric -- there was a belief that the WASP population was the most worthy of procreation. One way to combat the problem was to prohibit abortions -- if the lower classes were fruitful, the upper classes should have no other option but to bear children in

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[37]Smith-Rosenberg, Disorderly Conduct, 225.

[38]Smith-Rosenberg, Disorderly Conduct, 223-225.

equal numbers. This prohibition appeared to be a logical solution given the shift in the abortion clientele. Abortion was no longer only for shamed, single women. It had spread into the very foundation of what WASP society deemed to be American excellence.

In 1869 Dr. Hugh L. Hodge addressed the legal profession in a piece titled Foeticide, or Criminal Abortion. His intention was to procure abortion legislation by motivating the legal profession. The language in Foeticide is representative of typical presentations made by physicians involved in the movement. Hodge emphasized that abortion is "daily perpetuated in every part of the land, not only by the ignorant and degraded, but by those whose education and reputed moral worth and refinement had apparently raised them even above suspicion of vicious designs."[39] Hodge's experience, also typical of his fellow regular physicians, indicated that the "artificial causes of abortion are frequent both in the married and unmarried, and more frequent in the better classes of society than among the poor."[40] Hodge also argued that the new devotion to fashion and a decline in devotion to the Glory of God was a

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[39]Hugh L. Hodge, Foeticide, or Criminal Abortion: A Lecture Introductory to the Course on Obstetrics, and Diseases of Women and Children (Philadelphia: University of Pennsylvania, 1869), reprinted in eds. Charles Rosenberg and Carroll Smith-Rosenberg, Abortion in Nineteenth Century America (New York: Arno Press, 1974), 4-5.

[40]Ibid., 17.

broad societal trend. Abortion was an obvious and tragic symptom of this societal reprioritization. Hodge included testimony from obstetrician and former professor Dr. Gilbert who stated, "I have been called often upon by ladies of the most undoubted character, who very innocently suppose that it cannot be wrong to produce an abortion, so long as there is no quickening." Gilbert was shocked that high society and church women increasingly requested abortive services.[41]

Another doctor with twenty-five years experience expressed his fear that abortion by married, upper class women "is very extensively practiced among married women without the slightest compunction, and as a consequence I believe that the number of children has materially fallen off."[42] These testimonies of experience fueled the debate that upper-class women, both married and single, were seeking abortions at the expense of the birth rate.

Religious distinctions among abortion seekers were also a point of contention for some nineteenth-century physicians. One doctor identified only as Dr. J.C. said, "in the matter of abortions, that the greater number of those which I have attended spring up in Protestants...; I have never treated a case in a Catholic or Hebrew which I

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[41]Ibid., 16.

[42]Ibid., 17.

believed to be willful."[43] Dr. David Gilbert testified that "It is a fact well known to practitioners, that communing members of the Catholic and Israelitish churches are not guilty of this crime."[44] Dr. A.S. stated that Catholic women "are very much more free from the vice of criminal abortion than other women." Doctor J.M.C. was also concerned about the religious disparity. He noted that "Protestant women practice criminal abortion without any apparent misgivings of its gross impropriety, provided that the act is anterior to quickening...." His experience with Catholic women was the opposite. Protestant divine Reverend John Todd, D.D. of Boston noticed that "the practice of criminal abortion is far more common among Protestants than Catholics."[45] Horatio Storer attributes the more frequent abortions among Protestants solely to widespread ignorance concerning the true nature of abortion among the community and society as a whole. He rejected conventional thought that Protestant churches were condoning abortion.[46]

The physicians' movement was concerned with an increasing religious disparity in the emerging population. Physicians desiring to organize into a professional

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[43]Ibid., 21.

[44]Ibid.

[45]Ibid., 21-23.

[46]Horatio Robinson Storer, M.D., Why Not! A Book for Every Woman (Boston: Lee and Shepard, 1868), 64.

association were typically sons from a wealthy family who studied in Edinburgh or with the more prominent American physicians. Those sons were not only from wealthy families, but most frequently from families of the Protestant faith as well. Based on the traditional composition of regular physicians, they were among the group that was procreating least quickly. The collective fear of being outbred was personal to the regular physicians of native and economically elevated stock. They were among those being outbred.

Horatio R. Storer did not attempt to disguise his longings for continuing WASP superiority when he attributed abortion with the increasing "ill health of our women and in the gradual dying out of our native population...."[47] According to Storer, "It was proved... that in one state, one of the wealthiest in the Union, the natural increase in population, or the excess of births over deaths, has of late years been wholly by those of foreign origin."[48] Storer's attention to the increase in the foreign population at the expense of the native born feeds off of collective WASP fear. This fear drove the organizing physicians' collective action and acted as a significant spark to legislators. The

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[47]Horatio Robinson Storer, M.D., Is It I?: A Book for Every Man (Boston: Lee and Shepard, 1868), 95-96.

[48]Horatio R. Storer, Why Not!: A Book For Every Woman (Boston: Lee and Shepard, 1868), 63.

power structure was composed of mainly WASP men, so that collective compulsion to act had a political and legislative outlet. Storer's colleague Andrew Nebinger shared the fear of increasing foreign populations. Nebinger determined "that wherever the births most exceed the deaths, there the foreign element most abounds; but where the population is made up mostly or entirely of the original native stock, the births and deaths approximate near together...."[49]

Storer believed all members of the community to be responsible for the shortcomings and "evil deeds" of the community at large. Abortion, according to Storer, was a "crime not merely against the life of the child and the health of its mother, and against good morals, but it strikes a blow at the very foundation of society itself."[50] His believed that all members of the community should stand against abortion activity. By turning abortion into a crime against all white, native-born Americans, he advanced the transition of abortion into the public sphere, and it became a political and community issue. Eugenics and fear created a prime environment for abortion legislation to transform from protecting the mother to prohibitive legislation intended to protect native's position in the country.

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[49]Andrew Nebinger, Criminal Abortion: Its Extent and Prevention, read before the Philadelphia County Medical Society, February 9, 1870 (Philadelphia, 1870).

[50]Storer, Why Not!: A Book For Every Woman, 64.

Storer believed that community attention should be focused on informing individual women of abortion evils and on reforming abortionists.

Another example of Storer's rejection of individualism and embracement of community ideas is reflected in his memories of coverture -- a common law doctrine involving the absorption of a woman's legal identity into her husband's upon marriage.[51] Storer expressed regret that coverture was abandoned at law and noted that, "Formerly men had control, exclusive and entire, of any possessions of their wives." The implication seems to be that if men had control of all their wives' possessions then perhaps curtailing the frequency of abortions could be done with ease. Storer seems to hold women responsible for the abortion "crisis."[52]

Women, according to Storer, preferred "to devastate with poison and with steel their wombs, rather than... forego the gaieties of a winter's balls, parties, and plays, or the pleasures of a summer's trip and amusements."[53] Storer despised abortion and the underlying priority shift accompanying its frequency among the wealthy women of America. He deplored the idea that America's wealthy women

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[51]For a discussion of coverture see Michael Grossberg, Governing the Hearth: Law and the Family in Nineteenth-Century America (Chapel Hill: The University of North Carolina Press, 1985).

[52]Storer, Is It I?, 94.

[53]Storer and Heard, Criminal Abortion, 72.

were increasingly interested in exploring pursuits that conflicted with the traditional relational roles as doting mother and wife. Storer held that women belonged in the domestic sphere. By abandoning domesticity women were rearranging the structure of society -- a detestable act, according to Storer. Storer urged that women not pursue nontraditional pleasures and instead dedicate themselves to procreation and the maintainence of community well-being.

Storer's finger-pointing at women was significant because it reflected shifting attitudes concerning abortion and the slant of legislation. Formerly all restrictions were imposed to protect women -- the abortionist was the culpable party at law. Storer rejects the traditional apportionment of guilt. In Storer's mind, even "if the mother does not herself induce the abortion, she seeks it, or aids it, or consents to it, and is, therefore, whether ever seeming justified or not, fully accountable as a principal."[54] By shifting responsibility and guilt to women, in addition to physicians who agreed to perform abortions, prohibiting all abortions became significantly more logical. If women were held responsible for the declining native population, and for the unnatural act of abortion, then the solution to the problem was prohibiting their option to abort. Prohibiting abortions would be more

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[54]Ibid., 97-98.

effective than simply placing restrictions on those providing abortion services. In addition, preventing women's option to abort would prevent women from overstepping the traditional role allotted to females.

Storer did not believe that women were able to make a rational decision concerning pregnancy, particularly while pregnant. Storer maintains that a "woman's mind is prone to depression and, indeed, to temporary actual derangement, under the stimulus of uterine excitation." During pregnancy she is accordingly susceptible to whims that she would otherwise not be drawn to.[55] Storer neglects to note that women would obviously not be prone to consider abortion while not pregnant.

The attachment of abortion guilt to women themselves was also significant. The connection between rhetoric opposed to women seeking abortions and the alteration of the common law tradition had tremendous importance on the increasing regulation of the practice. A major step toward the prohibition of abortions was the prosecution of women in addition to the abortionist. Legislation targeting only the abortionist was originally framed as a protective measure. Targeting women in abortion legislation demonstared the transition from protective to prohibitive legislation. This shift was in direct conflict with the immunity provided to

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[55]Storer, Why Not!: A Book for Every Woman, 74-75.

women at common law and its early codification. The rhetoric of the physicians' campaign also challenged common law notions beyond women's immunity. Physicians attacked the validity of quickening doctrine itself, and they publicized their dissension beginning in the 1840s.

Doctors reevaluated the quickening distinction. They began to see pregnancy as a process with no one moment any more important to the development of life than any other moment. As D. Humphrey Storer, Horatio's father and professor of obstetrics and medical jurisprudence at Harvard University, said, "The moment an embryo enters the uterus a microscopic speck, it is the germ of a human being." He continued to state that, "it is as morally wrong to endeavor to destroy that germ as to be guilty of the crime of infanticide."[56]

The instant that the mother became aware of fetal movement was no longer thought by the physicians to be a moment with grand significance. Animation did not occur the instant fetal movement was noticeable, but rather the physicians declared animation and conception occurred simultaneously. The emergence of the new philosophy was a major turning point for abortion law in the United States. Quickening remained as a step in gestation, but it no longer held the significance of determining life or the presence of

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[56]D. Humphrey Storer, "Two Frequent Causes of Uterine Disease," Journal of Gynaecological Society of Boston 6 (March, 1872): 199, originally written in November 1855.

a soul. Storer was clear in announcing that "children are fully alive from the moment of conception,...."[57] Hugh Hodge refuted the quickening doctrine by declaring that, "the embryo is nevertheless endowed, at once, with the principles of vitality; and, although retained within the system of its mother, it has, in a strict sense, an independent existence."[58] Dismantling quickening and establishing an independent existence of the fetus combined with the dissolution of women's common law immunity opened the gateway for strict anti-abortion laws.

The acceptance of animation at conception introduced a new need in abortion legislation, the consideration of rights. At what point was the mother guilty of a serious crime? When did fetal life become equal to and greater in importance than the woman's traditional ability to access abortion services with ease? Another question to be addressed at law involved exceptions to the statutes. It is paradoxical that the physicians, who preached animation at conception and the absolute evil inherent in abortion, were the group allotted the power to make exceptions to their absolute beliefs. The therapeutic exception, increasingly common as legislation evolved, meant physicians could allow abortion, the very act that they rhetorically bashed. The contradiction in the physicians' position is explained by

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[57]Storer, Is it I?: A Book for Every Man, 95.

[58]Hodge, Foeticide, 15.

the power that regulars gained from the authority to grant abortions. That power significantly increased their status and helped to entrench regulars as the most qualified medical professionals.

In addition to fear of growing population disparities and a shift in the way some prominent physicians viewed abortion, there were other societal factors at work. The most significant of which included the commercialization of abortifacients and the rise of mass urban newspaper circulation. Together they created an atmosphere for the introduction of a new wave of abortion laws. The visibility and increasingly public nature of abortion were significant elements in the evolving debate. Abortion practices were changing, in addition to its clientele and public profile.

Before the 1840s women most commonly procured abortion in their home. That fact was not completely altered after 1840, though commercialization and advertisements of abortion remedies publicized the practice to a large extent. By the 1844, the Boston Medical and Surgical Journal reported the presence of six practitioners selling abortifacients in the local area.[59] In-home abortifacients on the market consisted of pills, fluid extracts, and oils. The majority were pills and fluid extracts with one outstanding ingredient, typically an aloe or black

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[59]Boston Medical and Surgical Journal, XXXI, No. 6 (Sept. 11, 1844), 124, cited in Mohr, Abortion in America, 53.

hellebore. The minor ingredients in the typical pill included a blend of powdered savin, iron, ergot, and solid tansy and rue extracts. Women were advised to take the pills and drink tansy tea twice daily until the obstruction was removed. Fluid extracts were oils of savin, tansy, or rue contained in alcohol with wintergreen added to make the potion ingestible and palatable. Some of the concoctions were effective, though a number of recommended remedies were not.

The abortifacients were sold under commonly known terms including the "Female Regulator," "Periodical Drops," the Uterine Regulator," and "Woman's Friend." The phrases were merely suggestive though the product labels made the potential use apparent.[60] Warnings typical to a subtly titled abortifacient advised the user that the concoction would surely cause a miscarriage if used by women in their early months of pregnancy. Boston based drug firm Goodwin and Company in 1847 sold seven brands of pills targeting women. The brands included "Hardy's Woman's Friend," "Belcher's Female Cure," "Lyons's Periodical Drops," and "The Samaritan's Gift for Females." In 1885 Chicago druggists Fuller and Fuller marketed "Dr. Caton's Tansy Regulator," Colchester's Pennyroyal and Tansy Pills," Colchester's Pennyroyal Pills," and Cook's Cotton Root

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[60]Brodie, Contraception and Abortion, 225.

Compound." All of those were attributed with the restoration of menses and ability to trigger a miscarriage. The label on "Graves Pills for Amenorrhea" stated that, "These pills have been approved by the Ecole de Medicine, fully sanctioned by the M.R.C.S. of London, Edinburgh, Dublin, as a never failing remedy for producing the catamenial or monthly flow. Though perfectly harmless to the most delicate, yet ladies are earnestly requested not to mistake their condition as MISCARRIAGE WOULD CERTAINLY ENSUE."[61] Even in 1900, after the legislative shift, the E.L. Patch Company in Boston offered emmenagogues through their catalogue. The pills were "Chocolate covered, 5 1/4 gram tablets with one grain each cotton root, iron sulfate, aloes, ergotin, black hellebore, and 1/4 min. oil of savin."[62]

Abortive instruments were also commercially available with growing frequency after the 1840s. Devices designed to produce an abortion were sold through the mail, in retail drug stores, and by wholesale druggist' mail order catalogues. A wide variety of instruments were available. There were different styles and models of both uterine sounds and dilators. By the 1850s, catheters, speculums, and uterine sounds were given attention in medical

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[61]"Criminal Abortion," Druggists Circular 2 (1858), 139.

[62]Brodie, Contraception and Abortion, 226.

journals.[63] An article in the American Medical Times, titled "Instruments of a Notorious Abortionist," described forty different abortion instruments. The majority of the devices were simplistic, including spoons with bent handles, wires attached to pen holders, and placenta forceps.[64]

In 1875 physician W.M. Smith from Atkinson, Illinois, discussed the success and danger of instrumental abortions in a letter to the editor published in Medical and Surgical Reporter. Smith said, "After the failure of tansy, savin, ergot, cotton root, lifting, rough trotting horses, etc., a knitting needle is the stand by. One old doctor near here was so obliging as to furnish a wire with a handle, to one of his patients, which did the work for her, after which she passed it to one of her neighbors, who succeeded in destroying the foetus and nearly so herself."[65] Given the great potential for failure of pills, fluid extracts, and oils, the instrument provided another course of action. Women turned to surgical methods after exhausting herbal possibilities.[66]

When women turned to abortion services outside their home and attempted non-herbal abortion methods, they sought

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[63]Ibid., 225-227.

[64]"Instruments of a Notorious Abortionist," American Medical Times 6 (1863), 34.

[65]W.M. Smith, Letter to the editor, "The Prevalence of Abortion," Medical and Surgical Reporter 33 (1875): 259.

[66]Mohr, Abortion in America, 53.

the aid of a midwife or went to a lying-in boardinghouse. Midwives identified the nature of their business to the public with a flag dangling from a window. By the mid 1800s, the majority of abortionists were referred to as "female physicians." Both New England and the Midwest had lying in abortion services within their borders. The establishments were privately owned boardinghouses, clinics, and offices. Legal historian Janet Farrell Brodie admits uncertainty about the number of such facilities, though they were typically managed by midwives trained in Europe.[67]

One such facility was New York City's Lying-In Institute located at 6 Amity Place. The operation was managed by Julia and H.D. Grindle. Their circulars from the 1860s mention the abortion methods available, including powders and the vaginal syringe. The actual advertisement guarantees "certain relief to ladies at one interview with or without medication."[68] The Grindles also offered a bottle of pills, sold for two dollars, "which when taking according to directions will remove all obstructions of the womb and bring on the menstrual periods, from whatever cause produced." The Grindle's explanation went on to state "Caution: If this medicine is taken during the early months

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[67]Brodie, Contraception and Abortion, 227-230.

[68]John Paull Harper, "Be Fruitful and Multiply: The Reaction to Family Limitation in Nineteenth-Century America" (unpublished Ph.D. dissertation, Columbia University, 1975), 55.

of pregnancy it will be sure to produce a miscarriage. However, if any should make a mistake and a miscarriage be the result, it will not in the least injure their health."[69] The Grindle's operation was fairly lucrative, though the couple encountered multiple law suits as a result of their success.

In 1868, Mr. Grindle was indicted on abortion charges. A woman died following a suspected abortion while recuperating at the Grindle's facility. Grindle was acquitted since there was no proof that the abortion caused her death. She simply died while staying at their boarding house. Both Mr. and Mrs. Grindle were indicted four years later. They sold a woman a twenty-dollar bottle of abortifacients. The judge declared that the Grindles were not guilty as the woman did not tell them that she was indeed pregnant. The intended use was thus in question, and the couple was not culpable at law for selling abortifacients to a woman with child.[70] The Grindle's interaction with the law, however, was minor compared to what other abortionists faced. The story of Ann Lohman illustrates the room for success and ruin when operating a large scale abortion service.

Ann Lohman's abortion service from 1839 to 1877 proved tremendously lucrative. Lohman became the most infamous

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[69]Brodie, Contraception and Abortion, 228-229.

[70]Harper, "Reaction to Family Limitation," 124-125.

abortionist in New York. Her fame warranted a cover name; she was known as "Madame Restell." Like many of America's abortionists she had European roots. She was born in Painswick, England, and later returned to England immediately before delving into the abortion services. Restell's operation was large scale and was aggressively advertised. Restell's first advertisement was printed in the New York Sun on March 18, 1839. The advertisement announced the arrival of Restell in the world of family limitation. She attempts to intrigue all readers who are interested in the advantages of family limitation. The advertisement reads

> TO MARRIED WOMEN.-- It is not but too well known that the **families of the married** often increase beyond the happiness of those who give them birth would dictate? In how many instance does the hard-working father, and more especially the mother, of a poor family remain slaves throughout their lives, "urging at the oar of incessant labor, toiling to live, living but to toil," when they might have enjoyed comfort and comparative affluence; and if care and toil have weighed down the spirit, and at last broken the health of the father, how often is the widow left, unable, with the most virtuous intentions, to save her fatherless offspring from becoming degraded objects of charity or profligate votaries of vice? Is it desirable, then, is it moral for parents to increase their families, regardless of consequences to themselves, or the well being of their offspring, **when a simple, easy, healthy, and certain remedy is within our control?**
> The advertiser, feeling the importance of this subject, and estimating the vast benefit resulting to the thousands by the adoptions of means prescribed by her, (introduced by the celebrated midwife and female physician, Mrs. Restell, the grandmother of the advertiser,) and who has made

> this subject her particular and especial study, has opened an office, where **married females** can obtain the desired information.[71]

In addition to newspaper advertising campaigns, Restell utilized circulars. Circulars proved an effective method of spreading information about her abortion office and the mail order business. Restell offered women a solution to unwanted pregnancy. Besides the pills she sold, a simple operation was available at her office. Restell's pricing methods were based on a sliding scale. The average wealthy woman was charged $100 for the procedure while her poorer sisters may only be charged $20.[72] Restell scholar Clifford Browder determined that "her circulars were in demand, her reception room was never empty, and when she opened her office in the morning, she might find a half dozen customers at the door."[73]

Restell's life illustrates the potential to earn a fortune in abortion services and displays the alteration in the law's tolerance for abortionists. Prior to her arrest in 1878, her services were in such high demand that she opened branches in New York, Philadelphia, and Boston.[74]

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[71]Sun, March 27, 1839. The advertisement began on March 18; reprinted in its entirety in Clifford Browder, The Wickedest Woman in New York: Madame Restell, The Abortionist (Hamen, Connecticut: Archon Books, 1988); emphasis added.

[72]Clifford Browder, The Wickedest Woman, 16.

[73]Ibid., 17.

[74]Allan Keller, Scandalous Lady (New York: Antheneum, 1981), 5-7; Brodie, Abortion and Contraception, 229.

Her career is testimony that women were seeking abortions in fairly large numbers, and that married women were the target of advertisements. It is significant that even her first advertisement in 1839 singled out married women as the ones to benefit from her services. Newspapers advertisements like Restell's increased the visibility of abortion, and drew attention to the fact that abortion was not simply for the single woman hoping to avoid shame. Abortion was available and sought out by married women, it was not only a recourse for the desperate, but it was also a method of family limitation.

The advent of urban newspaper mass circulation was a major factor in the commercialization of abortion and the anti-abortion campaign in the early 1840s. The increase in circulation was a result of an increasing urban population, printing industrialization, and the increased attention to commercial advertising. The circulation of the penny press furthered the commercialization of the abortion industry, and raised urban consciousness about abortion options. Thus, abortion was removed from the private world of woman seeking advice from other women -- placing it solidly into the lap of the male-dominated commercial and public world.

Newspaper coverage of abortion ironically undermined the very people paying to advertise in the papers. Advertisements for abortionists and abortifacients were a

regular source of income for the newspapers. During a single week in 1845, The Boston Daily Times ran advertisements for "Dr. Melveau's Portuguese Female Pills," "Madame Restell's Female Pills," "Madame Drunette's Lunar Pills," "Dr. Monroe's French Periodical Pills," and "Dr. Peter's French Renovating Pills."[75] Given the amount of paid advertisements the newspaper received in one week alone, it is ironic that the newspaper industry simultaneously began to undermine its financial contributors.

Competition between the urban newspapers sparked a wave of sensationalism. The ultimate goal was to grab reader attention, even if to do so meant diverging from truth and objectivity. Abortion was an issue which the newspapers were able to sensationalize with success. Particularly as anti-abortion rhetoric increased, the emotionally charged issue was a gold mine for the penny press.[76] The same industry that helped to catapult abortion services into the commercial world simultaneously furthered the efforts of anti-abortion crusaders.

The New York Police Gazette turned the abortion issue into a series of stories meant to incite fear. The sensational stories claimed that women were systematically

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[75]Mohr, Abortion in America, 53.

[76]Smith-Rosenberg, Disorderly Conduct, 225-226.

disappearing. The Gazette published stories claiming that abortionists actually sold the aborted baby bodies to medical schools. The fetuses would then be used in medical experimentation. A cover picture on the March 13, 1847 issue of the Gazette shows a woman of fashion with devils wing's in place of her arms. The attractive woman is pictured with a fang-toothed devil head peering from her pelvis while munching on a plump infant.[77] The woman is clearly depicted as unnatural and deviant, as dangerous and destructive.[78] The devil imagery symbolized the rejection of God's natural order and the absence of goodness in the action. The New York Police Gazette offered dramatic examples of the sensationalization of abortion.

Mainstream newspapers also sensationalized the coverage of abortion stories, including the New York Times. The Times coverage became even more forceful when George Jones assumed the position of manager and Louis John Jennings began as editor-in-chief. Coverage of abortion focused on deadly abortions. Daily articles and editorials were firmly against unrestricted abortion and called for prohibitive legislation. The Times tied two of the most prominent anti-abortion arguments -- the protection of women and the definition of abortion as murder. On August 23, 1871,

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[77]Cover, National Police Gazette II (March 13, 1847); Mohr, Abortion in America, 127.

[78]Smith-Rosenberg, Disorderly Conduct, 227.

reporter Augustus St. Clair wrote that abortion facilities were filled with thousands of people who "are murdered before they have seen the light of this world, and thousands upon thousands more of adults are irremediably ruined in constitution, health, and happiness."[79] The Times also furthered the physicians' quest by identifying abortionists without a medical diploma as quacks. The Times was not alone in attacking abortion in the editorial pages and with sensationalization tactics.

Increased commercialization raised public awareness to and sensitivity to the abortion issue. The physicians' use of fear and eugenics had an appeal to those typically in positions of power, lawmakers able to influence abortion patterns. The environment for additional abortion legislation was primed by the physicians' public reconsideration of quickening and the role of women in abortion. Their rhetoric seeped into state legislatures, and at times their influence upon the wording of laws was virtually direct. The increased public awareness of abortion due to commercialization drew attention and forced reaction to an act that was formerly private and used common botanicals from the garden. Businesses like Restell's increased publicity; such exposure altered the nature of abortive methods. Patented concoctions and office visits

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[79]As cited by Mohr, Abortion in America, 178-179.

joined the herbal preparations and physical routines followed in the privacy of one's home as alternatives to pregnancy.

The alteration in the nature of abortive services affected the societal status of abortion. It entered the public realm in two senses. People were relying on outside business people to enable the termination of their pregnancy. In addition, the new patented abortifacients opened the door to the world of commercial advertising. These two developments were mutually reinforcing. By opening abortion to the public realm in advertisements, the issue was then appropriate for the press. The same business that benefitted financially from abortion related advertisements presented a sensational glimpse of the abortion industry. Physicians actively wrote letters to editors in order to capitalize on the emerging public forum. Once abortion services entered the public realm and were advertised and addressed in the news papers, the public monitoring of that activity followed. As abortion became a public, visible, and commercial phenomenon, legislatures' involvement in the issue was increasingly justified.

Legislative Reactions to a Shifting Society

Accompanying the changes in the nature of the abortion industry and the country's awareness of abortion were twenty years of transitional abortion legislation. Between 1840 and 1860 society, physicians, and lawmakers began to react to the changes in the business of abortion. The period's legislation was not yet fully restrictive, but aspects of the common law tradition were being altered by the passage of statutes.

Massachusetts was the first state to pass a bill that addressed abortion as its sole issue; formerly, it had simply been attached to other criminal codes. In 1845 the governor of Massachusetts signed into law an anti-abortion bill that made attempted abortion a misdemeanor, and a felony if the woman died. Punishment was a one-to-seven year jail sentence. In an eight- year period spanning from 1849 to 1857, thirty-two abortion cases came before the court. None of those cases led to conviction of the abortionist.[80] Though the law was on the books, the failure to successfully prosecute thirty-two cases seems to prove that there was a loophole rendering it unenforceable. The statute did not

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[80]Mohr, Abortion in America, 122.

adjust the common law definition of pregnancy; to be pregnant one must be quick with child. Proving that the woman who sought an abortionist's services was pregnant proved virtually impossible for the prosecution. If not proven to be quick the woman could have been seeking the treatment for another condition.

The Massachusetts government passed the anti-abortion statute in response to two trials of abortionists that ended in acquittal. Both cases were topics in the popular press and came before Massachusetts courts. Commonwealth v. Luceba Parker began in 1843 when Parker was indicted. She was accused of providing instrumental abortions for three different married women. The case reached the Massachusetts Supreme Court in 1845. Chief Justice Lemuel Shaw heard the case and found Parker not guilty. His ruling was based on the Bangs decision which upheld the common law doctrine of quickening. Shaw adhered to the precedent that providing an abortion prior to quickening was not a crime. It was not proven that quickening had occurred.[81]

The other major abortionist trial prior to the passing of the anti-abortion law ended in a similar fashion. Dr. Alexander S. Butler was prosecuted because he provided an operative procedure and the abortifacient ergot. Also indicted was Fenner Ballou who was the woman's lover and the

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[81]Commonwealth v. Parker, 50 Mass. (9 Metc.) 263, 43 Am. Dec. 396 (1840).

party to finance the procedure. A jury of their peers found both men innocent. The basis of the decision was the common law. The pregnancy was not, or could not be, proven to be quickened. As a result of the publicized trials, the Massachusetts legislature responded with the anti-abortion bill in an attempt to aid prosecution of such cases. The intended result was not actualized.[82] The law in Massachusetts was a move toward restrictive legislation, but it was not a significant divergence from the common law. The issue of fetal development still prevented enforcement of the law. The quickening was firmly intact in the courtroom, the statute did not break with the quickening doctrine.

A major break with the common law tradition came with the 1845 New York abortion law. The first portion of the law simply tightened existing sentences. The woman's or fetus' death was deemed second-degree manslaughter after quickening. According to the new law, any one to "administer to any pregnant woman, or prescribe for any such woman, or advise or procure any such woman... with intent to procure miscarriage" faced a jail sentence of three to twelve months. Again, the New York law held to language

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[82]Mohr, Abortion in America, 120-121.

that rendered it essentially unenforceable -- determining pregnancy hinged on quickening.[83]

The truly new portion of the law dealt with the culpability of the woman herself. Until the passage of the 1845 New York law, the common law tradition exempting the woman from guilt was honored throughout the United States. She was guilty if she performed the abortion alone, sought the services of an abortionist, and for allowing the abortion to be carried through. The woman faced three to twelve months in jail and or a $1,000 fine. The woman's jail sentence equaled that of the potential sentence of an abortionist. For the first time at law, the woman was as responsible as the person performing the procedure. The break with the exemption of women introduced an entirely new concept in abortion law. The step was significant, though it was not once enforced during the nineteenth century. As a result it was a revolution in the theory of abortion law, not in its enforcement.

The motivating factors behind the 1845 bill, including the efforts of Dr. Gunning Bedford, proved as interesting as its results. Bedford was attempting to specialize in his medical practice, choosing to pursue obstetrics and gynecology. Throughout the 1840s Bedford denounced Madame

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[83]cited in Cyril C. Means, "The Law of New York Concerning Abortion and the Status of the Foetus, 1664-1968: A Case of Cessation of Constitutionality," New York Law Forum 14 (Fall, 1968), 454.

Restell -- the two were competitors. Other physicians rallied in support of Bedford's efforts. The physicians led a campaign that denounced the new commercialization trend in abortion services. Such commercialization was coined "Restellism" by Bedford and supporting regulars. The regulars began to see that abortion could not be ended simply by punishing the party providing the service. According to one New York physician in 1846, "Restell is to be looked upon as an effect, rather than a cause... The legislature must go to the root of the evil, of which this abomination [Restellism] is the fruit. That root, I am satisfied, is popular ignorance and prejudice, founded on that ignorance."[84]

As physicians began to recognize that the nature and target of abortion law needed change, the legislature of New York apparently did as well -- as evidenced by the break with common law. The fact that abortion was seemingly serious enough to require the fundamentals of common law be changed suggests that abortion was frequent and that it was not as heinously dangerous as regulars and press sensationalists were indicating. The regulars were politically involved and Bedford even had an influential relationship with the mayor of New York.[85] In addition to

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[84]A Physician of New-York, Trial of Madame Restell, I, 19; Mohr, Abortion in America, 128.

[85]Mohr, Abortion in America, 123-124, 291 at n.14.

the physicians' influence, the popular press also played a role.

The National Police Gazette sensationalized abortion stories during the mid-1840s. The editors strongly called for increased regulation of abortion. According to Mohr, the declining birth rate also influenced New York legislators. Women were bearing fewer children and legislators viewed this as negative, according to a statement made by a New York physician. The active, anti-Restellism regular noted that, "checks on population... At present, and in this country, population is wealth and a blessing, and the public is not disposed to look with favor upon any means for keeping it down."[86] Fear of a population drop in combination with timely sensationalization in the public press, as well as physicians' desire to remove competition from abortionists, all influenced the introduction and passage of New York's 1845 law.

Just as New York determined that another legal method was necessary to curb abortion activity, Massachusetts also explored alternative laws. New York's method, on paper, was to hold the women responsible and attempt to halt the abortion business. In Massachusetts the method was to hinder abortion related advertising. The idea was to eliminate access to knowledge about where to find abortionists and abortifacients making it inaccessible. The

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[86]Ibid.

1847 prohibition of advertisements was born of concerns about the declining number of births since abortion and contraception were linked by the law. According to the law

> Whoever knowingly advertises, prints, publishes, distributes or circulates, or knowingly causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious; from whom, or to any place, house, shop or office where, any poison, drug, mixture, preparation, medicine, or noxious thing, or any instrument or means whatever, or any advice, direction, information or knowledge, may be obtained for the purpose of **causing or procuring the miscarriage of a woman pregnant with child or [of] preventing, or which is represented as intended to prevent,** pregnancy, shall be punished by imprisonment in the state prison for not more than three years or in jail for not more than two and one half years or by a fine of not more than one thousand dollars.[87]

The bill treats abortion more as a method of family limitation and less as a moral issue of life and death. Prior to quickening, abortion was equated more closely with contraception. The measure resulted in frustration for anti-abortion crusaders concerning the unenforceable nature of the abortion laws thus far. Advertisement could be regulated while monitoring abortion was proving unsuccessful.

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[87]"Search in Journals," Papers of the Birth Control League, Atlas, January 20, 1845; cited in Mohr, Abortion in America, 130, (emphasis added).

The inclusion of the word "knowingly" softened the law which was intended to be a forceful measure against advertising. "Knowingly" introduced a loophole for the publishers and distributors of newspapers. This left room for the continuation of advertising so long as it was subtle and veiled. If the intention of the advertisement was not clear, the newspapers could feign ignorance.

In 1846 Vermont introduced its first legislation addressing abortion. The law criminalized the attempted abortion of quickened children. If the woman died from the abortion attempt, it constituted a felony. Michigan passed its first legislation in 1846 as well. Michigan's law resembled that of New York. The state legislature deemed abortion at any time a crime punishable with a maximum $500 fine or a year in jail. Abortion after quickening was considered manslaughter. Michigan also included a therapeutic exception clause requiring the opinion of two physicians.[88] That law granted them a special power; in Virginia, one doctor in particular was able to wield his power and influence the penning of a law.

Two years later Virginia passed a criminal code that included a section concerning abortion. According to historian James Mohr, the portion was essentially written by

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[88]Journal of the House of Representatives of the State of Vermont, 1846 (Windsor, 1846); Journal of the Senate of the State of Michigan, 1846 (Detroit, 1846) as cited in Quay, "Justifiable Abortion," 483-484, 515.

Richmond physician Levin S. Joynes, demonstrating the influence of the medical profession on Virginia's abortion law.[89] The statute was different because it dealt with the death of a fetus, rather than attempted abortion or the death of the woman. The punishment varied based on the level of fetal development. Terminating the development of a fetus before quickening was punishable with a jail sentence of one to twelve months. The death of a quickened fetus was punishable with one to five years in jail.[90] The law was framed in such a manner that avoiding prosecution was simple. The language of the law required possession of the dead fetus in order to successfully prosecute an alleged abortionist. The fetus was the only evidence indicating the stage of gestation and verifying that growth had been halted.

In 1849 California confronted the abortion issue. The revision of the California code included a section regarding abortion. The result was the criminalization of abortion only after the woman was clearly pregnant -- after quickening.[91] The same year, Wisconsin defined its legal

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[89]Mohr's assertion is based on Levin S. Joynes to Horatio R. Storer, May 4, 1859, Horatio R. Storer Papers, Countway Library, Harvard Medical School.

[90]Acts of the General Assembly of Virginia, 1847-1848 (Richmond, 1848), 96.

[91]Journal of the Senate of the State of California at Their First Session, 1849 (San Jose, 1850), discussed in Quay, "Justifiable Abortion," 451.

terms concerning abortion in a larger criminal code. The Wisconsin law rendered performing an abortion a crime after quickening.[92] Wisconsin and California both held to the common law notion that abortion prior to animation was legal.

New Hampshire also enacted legislation in 1849. The law meant New Hampshire was the second state to diverge from the tradition exempting women themselves from prosecution. Abortion was punishable with a maximum one year in jail or a $1000 fine. After quickening the punishment was raised to the monetary fine plus "confinement to hard labor not less than one year, nor more than ten years."[93] If the abortion resulted in the woman's death, the abortionist could be charged with second-degree manslaughter.

A significant section of the New Hampshire bill failed to pass in both the House and Senate. That portion would have made "any person who shall be knowing to the violation of the provisions of this act, and shall neglect to expose the same" subject to a maximum of one year in jail or $1000

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[92]The Revised Statutes of the State of Wisconsin, Passed at the Second Session of the Legislature, 1849 (Southport, 1849), 683-684, a discussion of Wisconsin's law is provided in Mohr, Abortion in America, 133.

[93]Journal of the House of Representatives of the State of New Hampshire, November Session, 1848 (Concord, 1849), 69, 84, 95, quoted in Mohr, Abortion in America, 133.

in fines.[94] That provision would have changed the nature of abortion legislation. No longer would it be an issue between a woman and her abortionist; any member of the community aware of such activity could be prosecuted for failing to expose the woman and the abortionist. If that provision had been accepted, abortion would have become a community issue -- everyone responsible for the activity of individuals. Population rhetoric already raised the abortion issue to the community level. Abortion, in various speeches, was called a crime against the community since there was a growing disparity in population. The failure of the legislature to pass that measure signified that law makers were not yet ready to institute a law that pitted neighbor against neighbor.

An 1849 New Jersey Supreme Court case propelled the passage of an abortion bill that same year. Chief Justice Henry W. Green upheld the common law tradition. In the State v. Eliakim Cooper Green held that abortion attempted prior to quickening was not illegal so long as the woman consented to the procedure. Green included self-abortions in that ruling. Green refused to break with common law tradition and noted that the legislature must act to change

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[94]Journal of the Honorable Senate of the State of New Hampshire, November Session, 1848 (Concord, 1849), 30, 33-34, 36-37, quoted in Mohr, Abortion in America, 133.

the tradition before the courts could diverge from the precedent.[95]

New Jersey responded with a bill that maintained immunity of the woman herself but criminalized abortion attempts. The legislature also banned providing advice on abortion methods. If such advice resulted in the death of the woman, the offense became significantly more severe. The New Jersey Supreme Court heard a case challenging the 1849 law. In 1858 Chief Justice Green heard the case of State v. Leonard Murphy. Murphy, accused of providing directions for the use of abortifacients, was found guilty in the lower court decision, and again by the New Jersey Supreme Court. The decision of the court examined the nature of the law when it was passed. The court determined that the law was a safety-based law meant to protect women from men like Murphy. Green declared that the law was passed to modify the common law tradition as called for in his 1849 State v. Eliakim Cooper decision. According to Green's opinion, "The design of the statute was not to prevent the procuring of abortions, so much as to guard the health and life of the mother against the consequences of such attempts."[96] The law addressed dangers women faced from incompetent abortionists, not abortions performed

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[95]State v. Cooper, 22 N.J. Law (2 Zab.) 52, 51 Am. Dec. 248.

[96]Ibid.

safely during the early stages of gestation when the procedure was least dangerous.

The territories of Minnesota and Oregon passed their first abortion statutes along with their criminal codes in 1851 and 1854, respectively. Both statutes maintained the quickening distinction. Unless the procedure injured the woman, abortion prior to quickening was legal. In 1854, Washington Territory passed a law which maintained women's immunity but criminalized all abortion attempts. Washington's statute used the clearest language by making it criminal to attempt abortion on a pregnant woman or a woman supposed to be pregnant. The Territory of Kansas passed a criminal code revision in 1855 that included an abortion section. It made abortion a misdemeanor regardless of quickening, though intent and pregnancy had to be proven. The intent clause rendered the law essentially unenforceable.[97]

In 1854, Texas assigned an unusually stiff prison sentence of up to ten years for post-quickening abortions. In 1856 Texas reformed the statute, and the applicable sentence was decreased to between two and five years. In instances of abortion when the woman did not consent, the sentence was between four and ten years. In 1856 the

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[97]Mohr, Abortion in America, 138-139; Quay, "Justifiable Abortion," 474, 486-487, 505, 517; Code of Washington (Olympia, 1881), 164.

legislature also added to the statute that if the woman died due to the abortion then the abortionists would be tried on murder charges. Those supplying abortifacients were considered accomplices to murder if the woman died. Texas did leave room for a therapeutic exception if the woman's life was in danger if the pregnancy continued.[98] In 1856 Louisiana passed a law attaching similarly severe jail sentences to post-quickening abortions. The Louisiana legislature deemed an abortionist should be punished with one to ten years of hard labor in prison.[99]

Dr. William Henry Brisbane was the driving force behind the passage of Wisconsin's abortion statute in 1858. Brisbane informed fellow crusader Dr. Horatio Storer that

> It is my present intention to endeavor to get a law passed by our legislature to meet the case, much too common, of administering drugs and injections either to prevent conception or destroy the embryo. It is an undoubted fact that, especially in high life, and in the middle ranks of society, many wives (and often with the connivance of their husbands) take measures of this kind.

Brisbane recognized that the law would most likely prove unenforceable but thought "the existence of a law making it criminal, would probably have a moral influence to prevent it to some extent."[100] On May 19, 1859, Brisbane mailed Dr.

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[98]Mohr, Abortion in America, 139; see also H.P.N. Gammel, comp., The Laws of Texas, 1822-1897 (Austin, 1898), 58, 1044.

[99]The Louisiana law is quoted in Quay, "Justifiable Abortion," 477.

Storer a note, attached to the law, saying "I succeeded in having enacted by our legislature the following statute."[101]

With Brisbane's influence, Wisconsin became the third state to remove women's immunity. The law stated that "every woman who shall take any medicine, drug, substance, or thing whatever, or who shall use or employ any instrument, or shall submit to any operation or other means whatever, with intent to procure a miscarriage" to be in violation of the law. Such women faced one to three months in jail or a fine up to $300.[102] The abortionist still faced a greater conviction for second-degree manslaughter, but the woman's guilt is significant nonetheless. It was a break with common law; with the removal of women's immunity abortion law was more prohibitive and no longer protective in nature.

It is significant that Brisbane referred to the husband's connivance in the abortion act and also pushed a law that removed women's immunity. If husbands were giving their tacit encouragement to wives seeking an abortion, perhaps both the husband and the woman would seriously consider the ramifications of doing so. It is likely that

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[100]William Henry Brisbane to Horatio R. Storer, April 6, 1857, Storer Papers, cited in Mohr, Abortion in America, 140.

[101]William Henry Brisbane to Horatio R. Storer, May 19, 1859, Storer Papers, cited in Mohr, Abortion in America, 140.

[102]Revised Statutes of the State of Wisconsin, 1858 (Chicago, 1858), 969.

just as the women may have hesitated to abort based on a fear of legal punishment, so too the husbands might hold back their encouragement if their wives imprisonment was a distinct possibility. Brisbane's power to affect the law and the removal of women's immunity corresponded with the trend of the regular physician's increasing legal leverage. The removal of immunity was consistent with the regulars' belief that conception began fetal life. That belief reinforced the idea that women are as criminal as the abortionists. The law in Wisconsin represents a departure from abortion law as protective legislation. Wisconsin's action exemplifies the broad trend away from laws concerned with the protection of women to laws targeting women.

Indiana revised its 1835 abortion statute in 1859 because it was typical of unenforceable abortion legislation. The revision was motivated by a distaste for the number of abortion advertisements circulating around the state. Advertisements excerpted from the newspaper were highlighted during the debating of the bill. The bill made a criminal of any person selling a medicine capable of procuring abortion or miscarriage. The legislature added an intent clause that provided a loophole for abortionists. The clause only made selling abortifacients illegal if sold

with the intent of inducing abortion.[103] Intent provided a slippery escape; abortifacients had dual purposes.

Iowa was without an abortion law when it became a state. The sections of the territorial code that dealt with abortion were omitted upon statehood. A slander court raised the abortion issue. Abrams v. Foshee and Wife involved Mrs. Foshee making public statements that Mrs. Abrams had aborted multiple fetuses. Abrams sued Forshee on slander charges and prevailed. Iowa's Supreme Court heard the appeal and reversed the decision. The judgment was based on the fact that abortion was not illegal. Since abortion was legal, it was not slander to accuse someone of abortion. The judge determined that having the public know of one's abortion habits would not ruin her standing in the community. The ruling stated that such accusations would not "exclude [a woman] from society and render her infamous in the common sense of that term."[104] Abortion was not equal to questioning someone's chastity, which would be slanderous at law. Accusations of abortion were compared to accusations of being a tattler, liar, person who swears, or a drinker.

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[103]The Indiana law is quoted in Quay, "Justifiable Abortion," 468.

[104]Abrams v. Foshee 3 Iowa (3 Clarke) 274, 66 A. Dec. 77 (1856).

The state supreme court decision sparked a new abortion statute. Dr. D.L. McGugin contacted an Iowa senator and called for a law in response to the Foshee decision. McGugin's senator introduced an abortion bill in 1858, but it was relatively lax. Using an instrument on or providing medicine to a pregnant woman with the intent of procuring an abortion was punishable by up to $1000 or one year in jail.[105] The wording of the bill referred to attempts after quickening, and the intent clause made the law basically unenforceable.

The law was an issue in another slander suit, Hatfield v. Gano. A woman was accused of self-abortion and sued on slander charges. The Iowa Supreme Court in 1863 stated, "It is clear to us from the wording of [the 1858 law], that it is the person who used the means with the pregnant woman to procure the abortion, and not the woman herself, that the legislature intended to punish."[106] Since the woman herself was not liable, it was not slanderous to accuse someone of self-induced abortion. Iowa's slander suits and the nature of the laws revised and introduced between 1840 and 1860 illustrate that abortion itself was not considered a heinous crime. The laws, with the exception of the three states mentioned, targeted the abortionist. They remained mostly protective pieces of legislation, or they attempted to

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[105]Mohr, Abortion in America, 144.

[106]Hatfield v. Gano, 15 Iowa 177 (1863).

target the increased and blatant advertising of abortifacients and abortion services.

The influence of individual physicians was also becoming apparent during that time period. The collective involvement of the physicians became even more apparent; the American Medical Association, AMA, was founded in 1847. The organization was able to channel the power that had been dispersed among individual physicians. The collective power of the AMA was greater than that of individual physicians pursuing the same goal. The AMA had an agenda that included elevating the status of its member physicians and the anti-abortion campaign would become a crucial part of that effort.

Physicians Unite

The American Medical Association was founded in 1847 to strengthen the position of American physicians. The prominent physicians that organized and professionalized sought to remove competition from the abundance of people practicing medicine. There were institutions passing out medical degrees without an emphasis on research and scientific method. There were also homeopaths and midwives practicing medicine as they always had. One means of promoting dominance by regular physicians was to push for licensing laws and self-regulation of the profession. The status of physicians, however, was not high enough that licensing alone would propel the institution. The physicians used the abortion issue as a rallying point for physicians to unite and be heard. Abortion was an issue that had convenient consequences, making it the ideal unifier for physicians.[107] They emerged from the nineteenth century as the only group powerful enough to allow an abortion. The irony of that role is thick, particularly given the prohibition of abortions in the Hippocratic Oath

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[107]The majority of literature detailing abortion in the nineteenth century includes some histort of the AMA. The most thorough of the sources is Mohr, Abortion in America.

and the abundance of rhetoric that abortion was an absolute wrong.

Since knowledge of pregnancy had advanced, and physicians accepted that life began at conception, they were able to make decisions of life and death. No other party was able to make that decision, not even the pregnant woman. That ability in essence raised the physician to a position of power equal to that of clergy and judge. The three were moral arbitrators and powerful enough to make decisions immediately influencing individuals.

Physicians adopted moral arguments as the dominant criteria for prohibiting abortion. Arguments of morality and natural law bolstered the rhetoric concerning eugenics and alteration of women's traditional functions. The 1871 AMA report relied on arguments from St. Paul and the Bible. Abortion was condemned as it diverged from the laws of nature and God. The physicians preached God's law, not strictly medicine.[108] Dr. O.E. Herrick referred to this phenomena as "half preacher and half doctor." Herrick continued to comment on the abundance of physicians tangled in preaching.[109]

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[108]Carl N. Degler, At Odds: Women and the Family in America from the Revolution to the Present (New York: Oxford University Press, 1980), 240-242.

[109]O.E. Herrick, M.D., "Specialties," Michigan Medical News, 4 (1881): 41.

Literature reflecting the moral arguments of the AMA was a major component of their agenda. The abortion issue was a sounding board for the newly organized physicians to rally around, and this rhetoric was ideal for catapulting the physician into the role of moral arbitrator. The physicians had direct and indirect influence over state legislatures and public opinion. Physicians lobbied their state legislatures, wrote letters to the editor, highlighted abortion at their annual meetings, held essay contests for anti-abortion material, and left evidence of loaded rhetoric in books concerning obstetrics and women's health issues. In effect, abortion legislation increased physicians' power. According to historian Janet Farrell Brodie, they did so successfully because they "'medicalized' what had not always been a medical issue."[110] Their status was elevated not only because abortion was molded into a moral issue but also the publicity created the image that physicians were specialists -- the authorities of gynecology.

The physicians' campaign to regulate abortions through legislation did not result in the prohibition of abortion. In fact, what resulted was a reallocation of the power to induce an abortion. The ability to choose an abortion that once rested with the woman carrying the embryo now lay with the physicians. Abortion legislation spelled out an exception to the criminalization of abortion -- it was

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[110]Brodie, Contraception and Abortion, 287.

acceptable to procure an abortion if the mother's life was in danger. Physicians were the group entrusted with the power to decide. Ten state laws stipulated that more than one physician must agree that an abortion was necessary to save the life of the mother. The law in Maryland expressed that a "respectable" physician make the proper determination, and two states stated that only "regular" physicians could authorize an abortion.

The power to override the abortion prohibition was significant in elevating the status of regulars to that of moral superior. Physicians, in that respect, had become as prestigious as members of the legal profession and the clergy.[111] They were officially entrusted with the power to make life and death decisions. The exception to the law itself bolstered the physicians' power to a new level.

Doctors could provide abortion if they determined it to be necessary to save the life of the mother. That fact alone symbolizes that, contrary to AMA rhetoric, abortion was not an absolute wrong. Storer preached that there was to be no latitude even in extreme cases[112]; ironically, his campaign rendered physicians the powerful group alone able to make exceptions. Though the AMA emphasized that the embryo had the right to life, that right was balanced with

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[111]Kristin Luker, Abortion and the Politics of Motherhood (Berkeley: University of California Press, 1984), 32.

[112]Storer, Why Not!: A Book for Every Woman, 74.

the mother's right to life. The mother's right took priority over the life of the developing fetus, a priority that physicians recognized, accepted, and arbitrated.

Not only could they make such a decision, but the grounds justifying abortion were vague. The phrase "to save the life of the mother" can be read in a variety of ways. Life can be assigned a very strict or loose definition. Saving the life of the mother could refer to a situation in which death is certain and immediate if the pregnancy is carried to term. The physician could also consider the long term physical well being of the mother. The legislation was vague enough to allow considerations that extended beyond physical status. A physician was able to consider the spiritual, emotional, mental, social, intellectual, and financial life of the mother as well. The access to abortion by no means ceased, but physicians had the sole discretion to determine when abortion was appropriate and when it should be forbidden. Not only was the status and power of regulars increased by the crusade for abortion legislation, but also the physicians could grant abortions in a manner consistent with a desire to slow disparities in the population growth.[113]

Physicians' efforts clearly colored the final phase of abortion legislation in the nineteenth century. Other factors were also shifting that again increased the

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[113]Ibid., 34.

perception that abortion needed to be strictly regulated, if not fully prohibited. The same press that increased abortion's visibility and commercialization ultimately aided the effort to regulate abortion. The New York Times provides an excellent example. The Times went through various phases in its abortion coverage. The attention to abortion began in the 1840s by the Times and other urban papers as a result of the influential physicians in New York. In 1863 the efforts of the AMA sparked an additional emphasis on the negative aspects of abortion. It is curious that the Times sought to sensationalize abortion stories, and to capitalize on the potentially horrific results of abortion. The Times had access to numerous tragic and timely stories of the destruction of the Civil War. The Times reported the death of a woman who sought a surgical abortion and declared that it was "high time that the attention of the public be directed to the scoundrels who, under the pretense of giving relief, entail direct misery upon thoughtless women, and at times hurry rash mortals into an undesirable eternity."[114]

As Madame Restell's business on Greenwich Street flourished, the community began to notice. That attention was negative in some circles. Samuel Jenks Smith edited the

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[114]New York Times, January 12, 1863, as cited in Mohr, Abortion in America, 177. Mohr also noted that the abortionist was not brought to trial as the incident occurred before quickening.

New York Sunday Morning News and was distressed by Restell's activity. On July 7, 1839, Smith's editorial declared that Restell's practice "strikes at the root of all social order -- is subversive of all family peace and quiet -- will generate jealousies and hate -- will demoralize the whole mass of society, and make the institution of marriage a mere farce." Smith was convinced that "If the laws cannot reach her, the voice of the people will; yes, it will call upon her in tones of thunder to abandon the nefarious trade in which she is engaged, and which she dares to say has never resulted in a failure."[115] Smith believed his voice inspired Restell's arrest in 1839. The charges were dropped as the prosecution's case was far from conclusive, and Restell continued her activity unchanged until the anti-obscenity fervor made room for the tyranny of Anthony Comstock in the 1870s.

Abortion law in the 1830s and 1840s was framed in a manner that meant any conviction was impossible unless the patient's death resulted. As Smith predicted, the law was unable to halt Restell's activity, but the newspapers were able to influence the attitudes concerning abortion, and the AMA's letter campaign influenced the newspaper industry. The AMA's campaign and the representation of abortion printed in the press increased the sense of urgency and

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[115]Sunday Morning News, July 7 and 14, 1839, cited in Clifford Browder, The Wickedest Woman, 17-18.

legitimacy in the anti-abortion campaign. Legislatures responded to the environment created concerning abortion. The slant appearing in the press significantly altered the climate for regulation. The AMA rallied to control the presentation of abortion in order to further AMA goals.

Abandonment of Quickening

The twenty-year period between 1860 and 1880 witnessed a flurry of legislative activity. State and territorial legislatures passed forty new and revised abortion statutes. Although some common threads ran through the statutes, the most significant commonality lies in the abandonment of the quickening doctrine. The legislatures were reacting to the regular physicians' campaign against abortion. A major feature of that campaign was the physicians' assertion that gestation was an uninterrupted process. Without interferance a human being emerged, and no point in that process was more or less significant than any other moment. The most crucial moment in the process was conception, all other periods of gestation were equally important in the formation of an infant. The mother's ability to feel fetal movement did not begin the life of the fetus, fertilization did. The shift in animation theory was an enormous departure from traditional legal, medical, and social thought in the United States. The organized regulars were a loud voice booming the conception message amongst themselves and to their state legislatures. During the late 1860s and 1870s, medical and scientific knowledge of bacteriology was

increasing as was their exposure to laboratory work, education, and research. The image of regular physicians was improving and their opinion was increasingly influential.

The first major departure from all common law tradition was in Connecticut's 1860 law categorizing a woman seeking an abortion as criminal. If she attempted to act as her own abortionist or if she submitted to the aid of another, the woman was subject to a sentence less severe than the sentence for her abortionist, but she was punished nonetheless. The disparity in sentencing was a remnant of the protective spirit of their former legislation. The law made abortion a felony with the abortionist facing up to five years in prison or a maximum $1000 fine. The law did not mention quickening as a distinguishing moment, and accomplices to the abortionist were also subject to prosecution as felons. Those people responsible for distributing abortifacients and advertisements for abortifacients faced a fine ranging from $300 to $500. The Connecticut law, like the great majority of others passed during this period, changed very little during the next hundred years.[116]

Pennsylvania revised its abortion law in 1860, making abortion a crime regardless of whether or not the woman was

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[116]Quay, "Justifiable Abortion, 454; Mohr, Abortion in America, 201-202.

pregnant. By removing the issue of pregnancy, the law rendered quickening insignificant. Quickening was important as it defined pregnancy. Since abortion was criminal with or without pregnancy, there was no need to determine if quickening had occurred. That removed the burden of proof and the question of intention when prosecuting an abortion case. The law applied to all attempts, not simply proven successes.[117]

Several territories responded to the abortion legislation activity rampant in the states. The codes introduced were reminiscent of earlier lenient provisions, but their presence signifies that addressing the issue in legislative form was standard. In 1861 the territories of Colorado and Nevada criminalized attempted abortions of women carrying children. Idaho, Montana, and Arizona followed with the same measure in 1864. The territorial code was penned in a manner that allowed for confusion in attempting to enforce the law. In 1864 Oregon enacted a much less ambiguous abortion law and removed quickening from the law. The offense was raised to a manslaughter charge in instances when the woman was injured and when her health remained intact.[118] Since the offence remained regardless of

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[117]Lorenzo D. Bulette, "The Law of Criminal Abortion in Pennsylvania," New York Medical Journal, LVII April 29, 1893, 475-478, and May 6, 1893, 502-508.

[118]Mohr, Abortion in America, 202-203; Quay, "Justifiable Abortion," 452-493.

the abortion's effect on the woman's health, manslaughter reffered to the action upon the fetus -- a major difference than the common law acceptance of abortion.

The deep South's Reconstruction governments joined in the abortion reforms typical of the entire United States during the period. In 1866 the Alabama legislature clarified its former code and increased the sentence facing abortionists. In 1868 Florida passed its first piece of abortion legislation. Abortion attempts at any period regardless of the effects on the woman's health were punishable by a maximum $1000 fine or between one and seven years in prison. Louisiana followed in 1870 with a revision of its abortion code. In addition to criminalizing abortifacient medicines, the legislatures outlawed abortions using instruments.[119]

In 1867 Illinois subjected abortionists to between two and ten years of imprisonment. Abortions which proved fatal to the woman were considered murder under the new, unanimously passed law. The only exception was abortion legitimated by therapeutic cause. In 1872 Illinois passed another unanimous law. It targeted people disseminating abortifacients and advertisements for abortion services. The 1872 bill, like the 1867 law, made an exception for

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[119]Quay, "Justifiable Abortion," 447; Mohr, Abortion in America, 204-205.

substances prescribed by "some well known and respectable practicing physician."[120]

Ohio was still operating under its 1834 law that resembled an anti-poisoning measure more than an anti-abortion law. In 1857 the Supreme Court of Ohio heard the case of Edward Robbins v. State of Ohio. Robbins was found guilty of first degree murder by a jury at a lower court. He provided Nancy Holly with four grains of strychnine in order to procure an abortion. The consumption of strychnine resulted in Holly's death. The Supreme Court overruled Robbins' murder conviction based on his intention in providing the substance. The Court ruled, "Where a drug is administered to a woman pregnant with a quick child, with intent not to kill the woman, but to produce abortion, and the woman dies from the effects of the drug, the offense cannot constitute murder in the first degree."[121] The justices determined that though Robbins may have been able to be found guilty of something, he was not able to be convicted of murder. The intent to abort and the intent to murder were not related in the eyes of the court.

The Ohio state medical society campaigned heavily for an anti-abortion law to update the 1834 law. The special legislative committee formulating the new bill was inundated

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[120]as cited in Quay, "Justifiable Abortion,", 465, and Mohr, Abortion in America, 206.

[121]Edward Robbins v. The State of Ohio, 8 Ohio ST. 131, 1857 WL 73 (Ohio, 1857).

with materials representing the AMA's beliefs. Horatio Storer's major works were among the information presented. The committee highlighted information it had determined to be accurate. They concluded that abortions in Ohio were frequent and families were accustomed to using abortion as a means to limit their number of offspring. They also determined that in rural and urban areas alike, "there is a class of quacks who make child-murder a trade, and we regret to add they are too well-patronized and sustained, to a considerable extent, by public opinion."[122]

The public support of abortion, they concluded, was because the public accepted the quickening distinction. The committee obviously now rejected the quickening distinction, and supported abandoning it even though their constituents seemingly embraced the doctrine. The significance of the committee's position was that they were clearly ready to impose laws that contained no hint of the common law tradition. The influence of the physicians upon the legislature appears to have been more significant than the tradition among the populace at large. The committee also reported that immigrant women aborted less frequently than native born women. The committee asked if native-women "realize that in avoiding the duties and responsibilities of married life, they are, in effect, living in a state of

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[122]Journal of the Senate of the State of Ohio..., 1867 (Columbus, 1867), Appendix, 233-235, cited in Mohr, Abortion in America, 207.

legalized prostitution? Shall we permit our broad and fertile prairies to be settled only by the children of aliens?"[123] On this basis the committee urged legislation. The bill was born of a distaste for foreign immigrants, not of fetal concern.

The committee's conclusion illustrates three ponits: that married women were having abortions, that a nativist motivation existed for legislation, and that the physicians were more influential than popular opinion. The committee also suggested that the physicians' assertions of abortions being highly dangerous were accurate. That conclusion seems to be contradicted by the seemingly frequent use of abortion as a means of family limitation. The safety issue was once again twisted in order to support legislation. Safety provided a veil for physicians' ulterior motives.

The reality of nativist concerns was evident in the close vote on an amendment that would have prohibited abortion for married women only. Single women in a socially unacceptable situation would still have had immunity; women in that position were often considered to be victims of seduction. The legislature was not firmly committed to the fetus; it was merely a weak excuse for nativism and physicians' control of the procedure. The amendment to the original bill failed 14 to 15. The vote was close illustrating a significant portion of legislators concerned

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[123]Ibid.

solely about married women, specifically married, native women. The amendment failed based on a coalition between members opposed to any further restriction on abortion and those desiring a restriction on abortion for all women. The original bill passed 21 votes to 8 votes without the amendment. The resulting bill in 1867 intended to "prevent the publication, sale, or gratuitous distribution of drugs, medicines and nostrums intended to prevent conception, or procure abortion."[124]

In 1867 Vermont abandoned the quickening doctrine but maintained women's immunity only in cases of self-abortion. The law also contained a section addressing the advertisement and distribution of abortifacients. The practice was no longer allowed. Fines for breaking that restriction ranged from $200 to $500.[125]

The territory of Colorado revised its abortion code in 1867. The code added a new twist to the therapeutic exception. The law legally justified abortion in instances when serious bodily injury was certain. The physicians were given the power to make the exception and had more leeway than simple instances of life versus death. The physicians

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[124]Journal of the House of Representatives of the State of Ohio..., 1867 (Columbus, 1867), 561, 594, 703-704, as cited in Mohr, Abortion in America, 208-209.

[125]Journal of the Senate of the State of Vermont, 1867 (Montpelier, 1868).

room to maneuver within the bounds of the law was expanded in Colorado territory.[126]

Maryland passed its first piece of legislation concerning abortion in 1867. The circumstances surrounding the passage of the law demonstrate the regular physicians' ability to influence abortion legislation. The law prohibited the advertisement of abortion services and abortifacients; it also provided rewards to informants. Information assistance was essential for the prosecutor to have a tight case -- the law permitted informant to testify as a witness in court. In addition, the bill outlined significant punishments for those who acted as an abortionist. The section of the law concerning abortion was added to a licensing law. It was intended to ensure that regular physicians held the dominant position in Maryland. The law stifled the ability of irregulars to compete with the professionalized class of physicians. Area medical societies pushed the legislation, and the result was licensing laws and an anti-abortion law in Maryland.[127]

In 1867 the New York state medical society gathered and compiled a general statement of desire with two specific suggestions. The medical society submitted the results to

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[126]Quay, "Justifiable Abortion," 452; Mohr, Abortion in America, 211.

[127]Journal of the Proceedings of the House of Delegates [Maryland]... 1867 (Annapolis, 1867), 829-830, cited in Mohr, Abortion in America, 211-213.

the committee on public health. In 1868 the legislature passed a law that corresponded with one of the physician's suggestions -- they prohibited the publication of advertisements that suggested abortion methods. In 1869 the other suggestion received a legislative response.

The physicians' submission stated that, "from the first moment of conception, there is a living creature in the process of development to full maturity." They suggest that terminating that process is equivalent to murder. They continued to state that, "this society will hail with gratitude and pleasure, the adoption of any measures... that will... arrest this flagrant corruption of morality among women, who ought to be and unquestionably are the conservators of morals and of virtue."[128] Ironically as women were revered as the moral fiber of society, they were also accused of being parties to murder. There is an apparent contradiction in the physicians' philosophy of women. If morally superior, women would be able to make an appropriate decision about abortion. If women were propagating murder, they could no longer be the conservators of morality. The contradiction was not apparent to the physicians themselves or to the legislators they sought to influence.

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[128]Journal of the Assembly of the State of New York at Their Ninety-First Session, 1868 (Albany, 1868), 443-444, cited in Mohr, Abortion in America, 216.

The physicians encouraged the legislature to drop the quickening doctrine, an efforrt that proved successful in 1869. The law made successful termination of pregnancy, regardless of fetal development, second-degree manslaughter. Even unsuccessful abortion attempts were made a misdemeanor. The traditional loophole was closed when the legislature added that it was a misdemeanor whether or not the woman was pregnant. The accompanying punishment was between three and twelve months in jail or a maximum $1000 fine.[129]

New York went even further by fine-tuning restrictions on abortion in 1872 when the legislature accepted a suggestion made by the Medico-Legal Society of New York. Abortion was no longer considered a capital offense. The revision was seen as wise, since convictions of an abortionist might prove more difficult if they faced capital punishment. The revision was not an act of toleration, it was viewed as a practical maneuver to increase convictions. When a woman consented to a procedure, it was doubtful that a jury would call for the death of the person requested to perform the procedure. The woman herself was also guilty of a felony if she sought an abortion or performed one herself, according to the 1872 law.[130]

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[129]Cyril C. Means, Jr., "The Law of New York Concerning Abortion," 458-490.

[130]Quay, "Justifiable Abortion," 501.

In 1869 the state legislature dismantled the Bangs precedent set by the Massachusetts Supreme Court fifty-seven years earlier. Massachusetts revised its law and declared that there no longer had to be proof of pregnancy in order to successfully prosecute on abortion charges.[131] Removing the need to prove pregnancy meant the demise of the quickening distinction -- which had been the main method of verifying pregnancy instead of some other irregularity.

In 1872 California passed a law that paralleled Massachusetts's divergence from common law traditions. The woman was guilty of a crime if she was her own abortionist or if she sought the assistance of an abortionist. The law also targeted the person performing the procedure and anyone providing the necessary items. The law stipulated that it was illegal to attempt to abort any woman. The law did not require that she be pregnant. The quickening doctrine was no longer good law in California as of 1872.[132]

New Jersey revised its 1849 protective abortion law in 1872. The new law was significant as it made the death of the fetus an offense equal to the death of the mother. New Jersey legislators clearly accepted the evidence put forward by physicians that pregnancy and life began at conception.[133] The following year Nebraska, Virginia, and Minnesota also

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[131]Mohr, Abortion in America, 219.

[132]Quay, "Justifiable Abortion," 450.

[133]Mohr, Abortion in America, 222.

embraced the concept of pregnancy as a process beginning at conception. They all passed laws that removed the quickening distinction. Minnesota's 1873 statute also criminalized self-abortions, though the woman faced a punishment less severe than an abortionist. Her crime was considered a misdemeanor while abortionists were deemed felons. The laws also contained anti-advertising sections.

The flurry of increasingly restrictive legislation coincided with the strong handed tactics of Anthony Comstock. His anti-obscenity crusade began in the 1870s at the national level, and was independant of the physicians' efforts. In March 1873 Congress passed the Comstock law. It affected the abortion industry only in terms of advertisements and mail order operations; it was geared to halt obscenity in general. Abortion was not the focus of Comstockery, though it was at odds with the heavy handed legal movement. Comstock was granted the power to enforce anti-obscenity regulations for the U.S. postal system and in advertising. Restell's demise in April of 1878 was a result of his campaign. Restell was arrested and harassed by Comstock. She killed herself before the highly publicized case came to trial. Comstock's success in derailing Restell's service was reliant upon the transformation of abortion law. The media latched onto Restell's arrest, and the prevailing opinion od abortion in the legislature no longer supported Restell's methods. Technically she was

arrested for breaking anti-obscenity laws in advertisements. The power structure's opinion of abortion had labeled it obscene. The result was a major victory for Comstockery.[134]

In 1875 Arkansas passed a law intending to restrict advertisements and to terminate the quickening distinction. Attempted abortion became a crime from the point of conception. Georgia followed suit in 1876. Attempted abortion at any time was made a misdemeanor. Successful abortion was equated with murder and was assigned a life sentence as the punishment.[135]

State legislators between 1860 and 1880 produced numerous and increasingly restrictive abortion laws. The quickening distinction was regularly removed from the law books, and the traditional common law immunity of women was vanishing as well. The majority of legislation passed during this period was altered very little for almost a century. Evidence of the effectiveness of the more restrictive legislation is evident in the results of court cases following the flurry of legislative activity. The physician's campaign to change perceptions of abortion proved successful in state legislatures. Legislative efforts to restrict abortion and close loopholes in prosecution also proved successful in the state courts. The

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[134]Brodie, Contraception and Abortion, 272-288.

[135]Quay, "Justifiable Abortion," 462; Mohr, Abortion in America, 224.

alterations increased the number of convictions as the prosecutors' burden of proof was reduced.

The alterations in statutory law after 1880 were relatively minor. States did not reshape abortion law, choosing instead to refine it. In 1881 Indiana, North Carolina, and New York all fine-tuned their abortion law. Indiana imposed fines or jail terms on women consenting to abortions. North Carolina deemed abortion after quickening to be a felony, and abortion at any time illegal. New York redefined sentencing in order to curb confusion and dissension -- capital punishment was deemed to severe for an abortionist fufilling a woman's request. The following year Iowa raised the jail sentence from one to five years.

In 1883 Tennessee, Delaware, and South Carolina passed abortion statutes that went without alteration for almost eight decades. Arizona and Idaho mandated that consenting women be charged as criminals. Wyoming followed suit three years later. In 1891 Colorado increased the charge facing abortionists from manslaughter to murder. Alabama significantly increased the potential jail term from between three and twelve months to between two and five years. In 1896 Rhode Island criminalized abortion at any stage of gestation but maintained the woman's common law immunity. Such revisions concluded abortion law tinkering for almost a century. During the same period as the final alterations, the courts revealed an acceptance of the new philosophy

governing conception and abortion. The criminal courts had traditionally been lenient in interpreting abortion laws, but they were beginning to demonstrate a willingness to give the benefit of doubt to the prosecution.

The legislative trend reduced much of the pressure on the prosecution. As the automatic loophole provided by quickening was plugged in the legislatures, the courts accepted the shifting burden of proof. Prosecutors no longer had to prove pregnancy or quickening in order to successfully convict. The defense was forced to prove that the abortion was medically necessary in order to be acquitted. The Colorado supreme court determined in 1872 that simply intending to procure abortion, regardless of success, was enough to convict an abortionist.

In the 1880 case of State v. Slagle, the North Carolina Supreme Court affirmed the invalidity of the quickening doctrine. The court ruled that, "it is not the murder of a living child which constitutes the offense, but the destruction of gestation by wicked means and against nature."[136] The same year the New York Supreme Court determined that quickening was no longer something that had to be proven. The prosecution's job was simply to establish that an abortion had occurred. In order to be found not guilty, the abortionist was forced to prove that the abortion was necessary.

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[136]State v. Slagle, 82 N.C., 653, (N.C., 1880).

In 1882 the Massachusetts Supreme Court heard Commonwealth v. Taylor. The court articulated that there was no need for the prosecutor to prove pregnancy or quickening. The court's main concern was no longer whether or not the woman was pregnant or quickened. The court was more concerned with the fact that abortion had been attempted. The Taylor precedent overruled the same court's Commonwealth v. Bangs ruling in 1812. Once replaced the precedent died. The Bangs case clearly articulated the common law theory that without proof of quickening, pregnancy could not be established. therefore, procuring abortion before quickening was not criminal. Bangs was decided solely on the fact that there was no proof of quickening, thus of pregnancy. The Taylor case, by contrast, was unaffected by the woman's stage of gestation or proof of pregnancy. In a seventy-year period the theory of abortion and its law underwent a complete transformation.[137]

Several cases represent the new willingness of the courts to accept uncorroborated testimony by a woman also implicated in the criminal case. In People v. Vedder, an 1884 New York case, the judge allowed the woman's testimony alone to convict the abortionist and the man that supported her decision to abort. The complete acceptance of the

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[137]Commonwealth v. Taylor, 132 Mass. 261 (1882); Commonwealth v. Bangs, 9 Mass. 369 (1812).

woman's testimony was interesting since she no longer benefitted from her common law immunity. In 1892 the Massachusetts supreme court came to the same conclusion and determined the unsubstantiated testimony by a woman also criminally liable would be accepted in court.

Another example of the drastic changes in the outcome of abortion cases was in Gus A. Eggart v. the State of Florida. The Florida supreme court convicted Eggart in 1898 simply because he suggested an abortifacient. He was convicted even though his suggestion was not used.[138] The court also reiterated that pregnancy and quickening were not material to the case. The courts were clearly demonstrating a tightening in abortion law based on legislation. Courts were also displaying a willingness to provide the prosecutor with the benefit of doubt where they had once made convictions near impossible. The court originally favored the case of the abortionist based on the difficulty of proving pregnancy and quickening. Intent was extremely difficult to establish and that had historically favored the accused. The transformation in abortion law altered that leniency. Increasingly the court accepted questionable evidence and placed the burden of proving necessity on the abortionist. As the possibility of successfully prosecuting an abortion increased, the laws became more meaningful.

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[138]People v. Vedder, New York, 1885, quoted in Mohr, Abortion in America, 235-237, 311.

Legislatures removed language in statutes that provided an escape route for abortionists.

Conclusion

At a lecture in 1868, Dr. Anne Densmore announced that abortion at any stage of gestation was murder. Some women listening fainted at the notion that they may have participated in murderous activity.[139] This illustrates the attitude common in America concerning abortion in the mid-nineteenth century. Under the common law transplanted from England, abortion prior to quickening was not considered a crime, or even a deplorable act. Several changes occurred across the nineteenth century to alter that perception. One major factor was the activity of physicians desiring to establish dominance in the field of medical service.

Physicians adopted abortion as a campaign. They challenged the notion that life began upon noticeable fetal movement and announced that pregnancy was a continual process that began at conception. The result, if uninterrupted, was life. The physicians were outspoken about their belief. Their opinions infiltrated journals and editorial pages. They successfully sought to enlist the aid of state legislatures and clergy to reinform people's abortion perspective. Animation at conception was not the

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[139]Mohr, Abortion in America, 73.

only factor motivating physicians; they hoped to boost their prestige and be classified as moral authorities. With increased prestige the physicians would be closer to dominating the medical field and reducing competition from "irregulars" including homeopaths and midwives. "Regular" physicians as moral authorities would be considered morally superior to "irregulars" willing to perform abortions.

Other social factors aided the physicians' campaign and supplied increased motivation to alter the common law of abortion. Notions of native superiority cleared the path for a movement among the most powerful segments of society. Abortions in the 1840s became increasingly common among wealthy married women. Abortions had formerly been a recourse for the single woman shamed by pregnancy. By the 1840s that stigma had changed; wives were seeking abortions and it was no longer simply an alternative for the desperate. It had become a form of limiting the size of a family.

This shift sent a shockwave through minds of Americans that feared the alteration of traditional familial roles. Lower classes and the immigrant population were procreating at a more rapid pace than native born Americans. Concerns about the population disparity fueled the drive to restrict abortions. Anti-abortion theorists held that WASP women would match the procreation rate of "unsavories" if access to abortion and abortifacients was denied at law.

Population concerns were personal to regular physicians as they were among the segment of the population that was potentially going to be outbred. Increased commercialization, and thus visibility, of the abortion phenomenon mutually reinforced the surge in abortions. All these issues increased sensitivity to abortion and created an environment favorable for restrictive legislation.

These factors enabled and propelled the transition in abortion legislation. Common law accepted abortions prior to quickening as benign, and even post quickening abortions were simply considered misdemeanors. Initial legislation sought to protect women from potentially fraudulent and dangerous commercial abortionists. Gradually legislation abandoned the quickening distinction. The result was more viable prosecutions since it had been virtually impossible to establish that quickening had occurred. Eventually the prosecutor's case was no longer affected by the success of the abortion or the issue of pregnancy. Even the advertisement of abortion services became illegal with the advent of Comstockery. Abortion and abortifacients were labeled "obscene." The most significant legislative shift dealt with women's liability. Lawmakers stripped women's immunity to prosecution for consenting to an abortion and performing the procedure themselves. Abortion laws were developed as a means to protect women, as the transformation

progressed, protection of women was abandoned and the legislation targeted women.

The emergence of the therapeutic exception was also significant. It empowered the very group that sought an absolute prohibition of abortion to sanction the act. Physicians had defined abortion as an absolute wrong. The result of their campaign was contradictory to their stated abortion philosophy. Abortion was only conditionally wrong, and physicians were the only group allowed to make that determination. If abortion was absolutely wrong, then physicians would not need the power to make exceptions. What seemed like a limited power to determine necessity actually increased physicians' power significantly. An exception was possible if necessary to save the life of the mother. Such a determination was made using a wide range of criteria -- was quality of life a factor? Also, how damaging would a pregnancy have to be to the mother to warrant an abortion -- could it be made only in instances of certain death or would the physician make an exception if permanent physical injury were imminent? The ability to make exceptions rested with physicians, and the wide variety of ways to interpret the issue meant a certain diversity in physicians' decisions. The ability to interpret the issue and decide if an abortion was to be allowed was empowering. The physicians gained an exclusive and significant power.

The aberration in American abortion history was motivated by several interests -- some genuine and some self-serving, as well as racist, and class-based. The increased prominence of the AMA and the domination of medical services was furthered by the physicians' involvement in the anti-abortion campaign. The traditional family, and the WASP family in particular, was also bolstered. The fear that WASP culture would be overrun and tainted by foreign influences had a definite impact on the willingness of Americans in power positions to tighten abortion restrictions. If there was not a way to mandate that certain people not procreate, then the natives must be forced to produce WASP babies and replenish native stock in the United States. The impulses to restrict abortion were far deeper than a moral desire to preserve fetal life. There were more odious intentions grounded in physicians' economic interests and a superiority complex toward more recent immigrants.

Social factors created an environment conducive to the legislative shift, though society in general did not propel the change in law. The physicians lobbied state legislatures and filled newspapers with editorials. Physicians in many instances had direct influence in the penning of statutes. They were extremely public with their desire to restrict abortion, and their language triggered people's fear and sensitivities. By mid-century the

physicians' impulse worked its way into state legislatures. The courts, which had traditionally been firmly committed to tenets of the common law, were forced to follow the statutory change. The legislative shift was dramatic and lasted for nearly a century.

The shift drove abortion underground unless sanctioned by physicians as a medical necessity. The shift marked a dramatic break from the common law position on abortion at the beginning of the nineteenth century. For almost a century the abortion law in the United States was at odds with the common law commitment to legal abortions early in gestation. Abortion legislation underwent a second dramatic shift in 1972. In Roe v. Wade, the United States Supreme Court supported a woman's right to terminate a pregnancy. This right was articulated in such a manner that it resembled the common law quickening tradition. The woman's right diminished as gestation progressed. The aberration in abortion legislation lasted between ninety and one hundred years; it was driven by the physicians' campaign. Both quickening and the trimester system laid out by Justice Harry Blackmun define an increase in fetal rights and a decrease in maternal rights as the fetus develops.[140]

Certainly advances in medical knowledge have changed the abortion issue immensely, but the quickening distinction has been a factor in the American abortion consciousness.

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[140]Roe v. Wade, 410 U.S. 113 (1973).

It is ironic that physicians as a group did not oppose the 1972 liberalization of abortion laws given their influence in the first American transformation of abortion law. Physicians gained status and significantly reduced medical competition with the first jurisprudential swing. Certainly some physicians have gained economically from the second shift. Another alteration in the abortion debate since the transformation in the nineteenth century is that women gained a political voice. During the dwindling adherence to quickening under pressure from the medical profession, women were not empowered with a vote. As the twentieth century progressed, women's voice in the abortion issue has led to increasing public fervor on both sides of the debate.

Given the resemblance between the common law stance and the present stance on abortion, the virtual prohibition of legal abortions is an aberration in U.S. jurisprudence. In order that such an exception occur the medical profession exerted significant influence -- and ultimately increased their collective power. Societal conditions were ripe for embracing the physicians' rhetoric given the nativist sentiment swarming in the country. The anti-abortion crusade that buried the quickening distinction was motivated by a great deal more than a moral concern for fetal rights.

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